IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 19....

NO. 79-386

JACK H. HARRISON, as Temporary Trustee of the Linn-Henley Charitable Trust,
Petitioner

vs.

BIRMINGHAM TRUST NATIONAL BANK, a national banking institution, as Co-trustee of the Linn-Henley Charitable Trust, SOUTHERN BANCORPORATION OF ALABAMA, a Delaware Corporation, et al,
Respondents.

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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APPENDIX A(1)

OPINION OF THE SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA –
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1978-79
APRIL 6, 1979

Birmingham Trust National Bank, et al.

77-382 v.

John C. Henley, III, et al.

AND

Charles A. Graddick, Attorney General

77-382A v.

Birmingham Trust National Bank, et al.

AND

John C. Henley, III

77-382B v.

Birmingham Trust National Bank, et al.

Appeal from Jefferson Circuit Court

SHORES, JUSTICE.

This is the second appeal in this case. See *Henley v. Birmingham Trust National Bank,* 295 Ala. 38, 322 So.2d 688 (1975).

For convenience, we reiterate the salient facts:

The Linn-Henley Charitable Trust was created by the will of Walter E. Henley, a former president and chairman of Birmingham Trust National Bank (BTNB), who died in December, 1961. His will named BTNB, or its successors, and his

nephew John C. Henley, III, joint executors of his will and joint trustees of the Trust. BTNB and Mr. Henley served as joint executors from December, 1961, until July, 1965, when administration of the estate was terminated. The executors were then discharged following a final accounting and the Trust was funded. BTNB and Mr. Henley continued serving as joint trustees of the Trust down to the present. Potential beneficiaries of the Trust, to be selected by the joint trustees, are limited to:

> ". . . any corporation or organization organized and operated exclusively for religious, charitable, scientific, literary or educational purposes . . .
>
> ". . .
>
> ". . . whose activities are exclusively within the geographical limits of Jefferson County, Alabama, or . . . which maintain branch operations within Jefferson County [but any amounts distributed to the latter] . . . must be expended . . . within Jefferson County . . ."

Assets of the estate of Walter E. Henley consisted almost entirely of bank stocks, a major portion of which was stock of BTNB. These stocks became the initial "inherited" assets of the Trust. As a result of various splits and dividends, the Trust owned 27,460 shares of BTNB stock in 1968.

In the fall of 1968, management of BTNB decided to form a one-bank holding company. The reorganization plan involved (a) formation of a new national bank, 100% of the stock of which was held by a Delaware business corporation, also newly formed, and (b) merger of the existing bank into the newly formed bank with the holding company issuing its stock, in a one-for-one exchange, to replace stock of the existing bank. The merger phase of the reorganization plan was governed by provisions of the National Bank Act, 12 USC 215a. One effect of this method of reorganization was that all stock of the surviving national bank (except directors' qualifying shares) would be owned by the holding company and the only stock available to the public would be stock of the holding company.

A stockholder vote was held on November 19, 1968, resulting in approval of the proposed reorganization by holders of more than 80% of the outstanding stock of the old bank. The Comptroller of the Currency (the federal official charged with supervision of national banks) gave his approval on November 25, 1968. The reorganization became effective December 31, 1968.

Henley opposed the merger/reorganization and decided it would be in the interest of the Trust to have the Trust dissent from the merger. The rights of dissenting stockholders are contained in the provisions of 12 USC 215a, supra. Basically, the dissent procedure calls for surrender of the stockholders' shares followed by an appraisal to determine their value. There is provision for the parties to appoint appraisers but, if for any reason the appraisal is not completed within 90 days, either party may call on the Comptroller to appraise the stock surrendered by the dissenter. The statute provides that the Comptroller's appraisal shall be final and binding on all parties. The national bank that survives the merger is required to pay dissenters for their stock at the appraised value. The final step in the dissent process requires the continuing national bank to sell at public auction the stock which would have been delivered to the dissenting stockholders had they not dissented. The continuing bank is expressly permitted to buy the stock offered at this auction but, if it does, it must dispose of the stock in some manner within 30 days. If the auction sale of the stock "that would have been delivered" brings more than the appraised value of the shares surrendered, the excess over the appraised value is paid to the dissenters.

No appraisal having been theretofore accomplished, BTNB, on September 23, 1969, wrote to the Comptroller asking him to appraise the stock of the Trust that had been surrendered in connection with the dissent.

On January 21, 1970, the Comptroller reported his appraisal, finding that, at the effective date of the merger, which was December 31, 1968, the stock of "old" BTNB had a value of $32.80 per share, making a total value of $900,688 for the 27,460 shares. This amount was paid by the "new" BTNB to

the Trust and accepted by Mr. Henley on behalf of the Trust. The "old" BTNB stock was surrendered at this time. This appraisal by the Comptroller was somewhat above the market. The market price on December 31, 1968, was 30 bid, 31 asked. In the trial it was accepted that the market price was 30½.

After making this payment, BTNB proceeded to hold an auction sale, as required by 12 USC 215a(d). With the approval of the Comptroller, the Bank first advertised an auction for 27,460 shares of the holding company stock, to be held on February 10, 1970. Shortly before the date advertised for this sale, Henley objected, pointing out that 12 USC 215a(d), supra, required that stock of the "receiving association" be offered at auction and contending that this meant the stock of the continuing national bank. Before the first auction, Mr. Henley delivered to one of the trust officers of the bank a letter in which he said:

> ". . . Inasmuch as there is in my opinion a real likelihood that the proposed sale will not attract bids in line with the true value of the stock, I invite the Birmingham Trust National Bank as Co-Trustee for the Linn-Henley Charitable Trust to join me in bidding at the sale and to purchase as many shares of common stock of BTNB Corporation as can be purchased at a price not exceeding $23.25 per share, *the last quoted bid price for such stock.* . . . You are in a unique position to know the value of the BTNB Corporation stock offered for sale and I believe you would agree that if the same can be purchased for $23.25 or less per share it would be a good investment for the Trust. . . ." (Emphasis Added)

The Bank declined to join Henley in purchasing or bidding for the holding company stock on behalf of the Trust. The only bid for the stock offered was made by the holding company. It purchased 27,460 shares of its own stock at $26 per share.

Being uncertain that the proper stock had been auctioned to satisfy 12 USC 215a(d), supra, BTNB held a *second* auction, at which 27,460 shares of the *continuing national bank* were ad-

vertised and sold on March 6, 1970. Again, the only bid was made by the holding company, this time at $24 per share. Since neither auction produced a bid in excess of $32.80 per share, there was no further payment by BTNB to the Trust as a result of these auctions (12 USC 215a(d), supra)

On the first appeal, Henley contended that BTNB had breached its duty to the Trust in several respects. A plurality of this court concurred to reverse the cause to the trial court to:

"1. Appoint a Temporary Trustee of the Trust Estate in lieu of the named co-trustees for the sole and limited purpose of the retrial of this cause.

"2. Upon resubmission of this cause, make the following specific findings of fact and conclusions:

"(a) Determine what data should, and except for the conflict of interests of the co-trustee—BTNB—would, have been made available to the Comptroller; and, from such data, fix the value of the 'old' bank stock as of the time such ascertainment is contemplated by the Federal Act. If the value as fixed is more than the value fixed by the Comptroller, award to the Trust as damages the sum equal to the difference against BTNB.

"(b) In which latter event (if the fixed value per share exceeds $32.80), determine the true bid value of the 'new' bank stock had BTNB, absent its conflict of interests, actively sought potential bidders as of the time of the public auction as provided by the Federal Act. If the bid value so fixed is higher than the ascertained value of the stock as fixed under (a) above, award to the Trust as additional damages the sum equal to such difference against BTNB.

"(c) If the ascertained value of the 'old' bank stock is less than $32.80 per share, but the per share auction value as fixed under (b) above exceeds $32.80, award to the Trust as damages the sum equal to the aggregate of the difference between such per share auction value and $32.80 against BTNB.

"It is suggested that the price obtained by BTNB upon resale of the 'new' stock within the 30-day period following the auction, as prescribed by § 215a(d), is rele-

vant data (subject, of course, to any admissible evidence of price variance) for consideration in making such determination.

"(d) Determine whether the ascertainable true value of Birmingham Realty stock and the asking price therefor of the 'N. Y. block,' along with the other material factors, rendered BTNB's conflict of interests responsible for an abuse of discretion in refusing to agree to such purchase. If so, award to the Trust as damages such sum as the Court may deem reasonable and adequate to make the Trust whole in light of all competent evidence adduced on this issue.

"(e) Determine whether BTNB's evidenced conflict of interests is so inherent in the nature of its relationship to the Trust and to the Co-trustee Henley as to render BTNB disqualified to further serve as co-trustee to the instant Trust Estate; or, whether the resolution of the instant controversy will so dissolve the conflict of interests as to render BTNB fully competent and qualified to serve as co-trustee; and to implement by order of the Court such determination as the interest of the Trust Estate may require.

"3. Determination and award of expenses and fees chargeable against the Trust Estate shall be limited to those reasonably and necessarily incurred by the Temporary Trustee and his attorney." (295 Ala. at 48, 49)

On remand, the trial court appointed a temporary trustee and approved his employment of counsel to retry the case. After a trial which lasted six weeks, the court entered the following final decree:

"FINAL DECREE

"This cause came on for trial on the merits, following remand thereof by the Supreme Court of Alabama, and was submitted to the Court upon pleadings and proof after more than six weeks of trial time. Counsel appearing for the parties were as follows:

"Morris K. Sirote and Jack E. Held, attorneys for the Temporary Trustee; Lee C. Bradley, Jr. and MacBeth Wagnon Jr., attorneys for BTNB and the Holding Company; Donald E. Sweeney, Jr. and James W. May, Jr.,

attorneys for the individual Co-Trustee, John C. Henley, III; Julian L. McPhillips, Jr., Barry V. Hutner and Jim O'Kelley each as Assistant Attorneys General, in behalf of the beneficiaries of the Trust Estate. The participation by the Attorney General in this cause has been active and continual from the outset until the present. Testimony of witnesses was received by the Court ore tenus and without a jury. Comprehensive post-trial and pre-trial briefs and letters which treated all possible subjects evident in the controversy were received and studied by the Court. The post-trial briefs and letters were accompanied by suggested decrees as prepared by the separate parties. The Court has duly considered all of the pleadings, written documents and exhibits filed in this cause, and all evidence and the briefs, letters and arguments of counsel, along with the data contained in the suggested decrees filed by all parties to this cause. Because it is believed by this Court that all of the contentions and authorities of all of the parties are fully expressed through these several documents all of this proffered material is expressly incorporated into and made a part of the record of this case for the edification of any reviewing Court.

"This Court finds that the findings of fact set forth in the suggested decree as filed by the attorneys for the Temporary Trustee are consistent with this opinion, and are fully supported by the overwhelming weight of the evidence. The Court is in agreement therewith, adopts the same as its own findings of facts and incorporates the same herein by reference.

"This Court will deal with the specific instructions set forth in Syllabus (14) 1, 2(a) (b) (c) (d) and (e) of its opinion seriatim, and will base its orders in response to these instructions and will not depart from the orbit of their content. Some new issues and theories have been raised by the pleadings, but this Court, as stated, will confine itself to the express mandate of the Supreme Court as contained in its opinion of remand, except as to such other issues which are consistent therewith and have not been foreclosed thereby. All motions of the parties not heretofore ruled upon are hereby overruled.

"In accordance with the directions of the Supreme Court, the Court makes the following specific findings of fact and conclusions in the order indicated:

"1. The direction to appoint a 'Temporary Trustee of the Trust Estate in lieu of the named Co-Trustees for the sole and limited purpose of the re-trial of this cause' has been complied with in the appointment of Jack H. Harrison, as the Temporary Trustee of the Linn-Henley Charitable Trust.

"2(a). Based upon the overwhelming weight of the evidence, 'the Court has determined what data should, and except for the conflict of interest of the Co-Trustee — BTNB — would, have been made available to the Comptroller; and, from such data, (fixes) the value of the "Old" Bank stock as of the time such ascertainment is contemplated by the Federal Act,' as hereinafter set forth in the decretal portion of this decree. Since this fixed value is more than the value fixed by the Comptroller, this decree will, in compliance with the directions of the Supreme Court, award to the Trust as damages a sum equal to the difference between the actual, fair and intrinsic value of the 'Old' Bank stock surrendered by the Trust following the effective date of the Merger and the value thereof as determined by the Comptroller of the Currency.

"In further compliance with the mandate of the Supreme Court, the Court finds and determines that the following data should, and except for the conflict of interest of the Co-Trustee — BTNB — would have been made available to the Comptroller of the Currency.

"(1) All facts which were known to, or which could have been ascertained by BTNB, as of the effective date of the Merger, showing or reflecting the actual, intrinsic or fair value of the 'Old' Bank stock as of December 31, 1968, appraising all material factors and elements affecting such value, on the basis that BTNB will continue as a going concern, including the nature and extent of its business and its operations, assets, good will, liabilities, earning capacity, investment value and market value of its stock, the earnings of the 'Old' Bank in the past and the regularity of the payment of dividends as well as the future prospects and the growth potential of the bank; an estimate of its future earnings and payment of dividends, and of the expected growth of the bank in earnings and dividends for the future, including an estimate of the dividends expected to be paid by the bank during the year 1969;

"(2) The plans and goals which were known, or should have been known to management of BTNB, as of December 31, 1968 for the expansion of its facilities, opening of new branches, expansion of its leadership in the credit card field, the expected international growth for BankAmericard, its plans for the expansion of its computer services; and all other relevant factors which BTNB knew or should have known as of December 31, 1968 showing and indicating that BTNB would enjoy substantial growth in earnings and in payment of dividends in future years, giving due weight to each of the factors entering into a valuation of the stock of the bank on a going concern basis, and exercising in this respect the professional knowledge, skill and business acumen expected of a corporate Co-Trustee, and that diligence and care which a prudent man ordinarily uses in his own concern.

"The Court further finds from the evidence that management of BTNB was highly competent; that on December 31, 1968 it was fully aware of its manifold expansion plans, of its great potential for future growth, and that its income and dividends would be increased in the year 1969 and thereafter, as in fact they were so increased to a very large extent; and that it was incumbent upon BTNB, as Co-Trustee and fiduciary, to furnish the data above enumerated to the Comptroller of the Currency, assuming that it was giving undivided loyalty to the Trust and that it eliminated its own selfish interests conflicting therewith.

"Based upon the foregoing data and all of the evidence introduced in connection therewith, the Court fixes the actual, intrinsic and fair value of the 27,460 shares of the 'Old' Bank stock as surrendered by the Trust as of the time such ascertainment is contemplated by the Federal Act, i.e. December 31, 1968, at FIFTY AND NO/100 DOLLARS ($50.00) per share. The difference between the total value of this stock ($900,688.00), as fixed by the Comptroller of the Currency, and of the total value so fixed by the Court ($1,373,000.00) is FOUR HUNDRED SEVENTY TWO THOUSAND THREE HUNDRED TWELVE AND NO/100 DOLLARS ($472,312.00), to which must be added interest at six percent per annum from January 1, 1969 (the effective date of the Merger) to September 1, 1977 amounting to the sum of TWO HUNDRED THIRTY THOUSAND NINE HUNDRED SIX-

TY AND NO/100 ($230,960.00). The addition of these two sums amounts to SEVEN HUNDRED THREE THOUSAND TWO HUNDRED SEVENTY TWO AND NO/100 DOLLARS ($703,272.00) which must be awarded in favor of the Linn-Henley Charitable Trust and against BTNB.

"2(d) & (c). The Court finds that, under the Plan of Reorganization here in question, and under the newly-developed evidence and the law applicable thereto, it clearly appears that BTNB did not provide for the holding of a public auction of the 'New' Bank stock, as provided by the Federal Act; that all such stock, except qualifying shares, were, upon the effective date of the Merger, transferred to and were owned by the 'Holding Company'; and that thereafter the 'New' Bank stock was neither marketable nor tradeable on any market. Additionally, on March 6, 1970, on which date BTNB attempted to have a public auction of this stock, more than 14 months elapsed since the effective date of the Merger. This unduly long delay was occasioned by the breach of fiduciary duty on the part of BTNB in improperly engaging in a struggle with the individual Co-Trustee, Henley, as to his right to dissent in behalf of the Trust from the Merger. In the meantime, however, the local market on bank stocks became greatly depressed.

"Accordingly, the Court further finds that BTNB made it impossible to hold a legal, realistic or meaningful public auction of the 'New' Bank stock, as required by the Federal Act, and that the public auction of this stock purportedly held by BTNB on March 6, 1970, aside from the fact that BTNB failed to actively solicit bidders at this auction, was totally ineffectual. For these reasons the mandatory instruction by the Supreme Court to determine the true bid value of the 'New' Bank stock, had BTNB, absent its conflict of interest, actively sought potential bidders as of the time of the public auction, as provided by the Federal Act, cannot, in the fact [sic] of the newly-developed evidence introduced by the Temporary Trustee, be effected by this Court.

"The Court further finds that, in the light of the newly-developed evidence adduced on the re-trial of this cause, and the legal theories advanced by the Temporary Trustee, that it was legally prohibitive and otherwise completely

impracticable for BTNB to hold a realistic and meaningful public auction, in accordance with the requirements of the Federal Banking Act, of *unregistered stock* of the 'Holding Company' on February 10, 1970, after a similar undue delay following the effective date of the Merger. For these reasons also the mandate of the Supreme Court under 2(b) and (c) above, even if it can be construed to apply to the public auction of the 'Holding Company' stock, as well as to the 'New' Bank stock, cannot be effected by this Court.

"Prior to the auction of the Holding Company stock, however, the Co-Trustee-Henley, advised BTNB, as corporate Co-Trustee, that it was to the apparent and best interests of the Trust that, in the light of all the circumstances then existing, the Trust itself should bid upon and purchase this stock at the public auction, and requested that BTNB concur in this advice. At the auction, BTNB ignored Henley's advice and request and collaborated with the 'Holding Company' in permitting it to be the sole bidder and purchaser of this stock.

"The Court further finds that such self-dealing on the part of BTNB, in collaboration with its affiliate, constitutes a separate, distinct and independent breach of trust on the part of BTNB which arises out of the same operative facts and the conflict of interests referred to by the Supreme Court in 2(b) and (c) above. Accordingly, the Court further finds that the claim for damages arising therefrom, as now presented and developed by the Temporary Trustee, is not inconsistent with anything determined by the Supreme Court under 2(b) and (c) and is so closely connected therewith, that this Court, especially under the New Alabama Rules of Court, may take cognizance thereof.

"The Court further finds from the evidence that Henley exercised sound judgment and prudence in seeking to protect the Trust against the inefficacious public auctions by suggesting that the Trust purchase this stock at the then depressed market prices, and that BTNB abused its discretion in failing to concur in the recommendations of Henley. Additionally, the Court finds that BTNB failed to resolve its conflict of interests either by petitioning this Court for instructions or by subordinating its own interests in favor of the Trust. By thus competing with the

Trust and engaging in self dealing, in and about the administration of this Trust, BTNB was guilty of an even more flagrant breach of fiduciary duty than the failure to actively seek potential bidders as of the time of the public auctions referred to by the Supreme Court in 2(b) and (c) above.

"The Court further finds that the 'Holding Company' in purchasing the 27,460 shares of its stock at the public auction in question willfully and knowingly participated in the violation of the fiduciary duty on the part of BTNB, with full knowledge of such breach on the part of BTNB, and that both BTNB and the 'Holding Company' are liable to the Trust for the profits accruing to them upon the purchase of this stock to the extent of the difference between the bid price of $26 per share made by the 'Holding Company' and the highest intermediate value of said stock up to the date of trial of $70 per share, and that both BTNB and the 'Holding Company' are liable to the Trust for such profits amounting to the total sum of $1,208,240.00.

"2(d). This Court, from the overwhelming weight of the evidence, finds, relative to 2(d) that the ascertainable true value of Birmingham Realty stock and the asking price therefor of the 'N.Y. Block', along with the other evident material factors, rendered BTNB's conflict of interests responsible for an abuse of discretion in refusing to agree to the purchase of that stock by the Trust. The unwarranted self-interest of BTNB in refusing this purchase resulted in the loss of a highly profitable investment for the Trust. The soundness of this investment for the Trust as a long-term investment should have been, in the exercise of due diligence and care, apparent to BTNB.

"The Court further finds that at the time the individual Co-Trustee proposed to BTNB that the 554 shares of Birmingham Realty Company stock be purchased by the Trust, the underlying value thereof was easily ascertainable and that the actual, intrinsic value of this stock at such time was approximately $2,000 a share; and that the assets of the Realty Company then consisted largely of land holdings, most of which were acquired many years ago at very low costs and were carried on its books at 1913 values, and that even at cost the company had a *book value* of $991.00 per share; that the current market price of the stock was

$700.00 per share, and that it was common knowledge in the local business community that the market price was undervalued and did not reflect the true asset values.

"The Court further concludes and finds that, as tentatively concluded by the Supreme Court, all the reasons assigned by BTNB when taken together, and fully analyzed, 'are but supportive of the conclusions stated in the Trust Officer's testimony, and demonstrate the legal conclusiveness of the conflict of interest on behalf of BTNB with respect to the transaction.' The Court further concludes and finds that the principal reasons which motivated the bank in refusing to consent to the purchase of this block of stock are those testified to by its Trust Officer whose testimony was reintroduced on this re-trial and stands unimpeached.

"As a proximate consequence thereof, the Trust sustained a loss in the sum of $939,500.00, represented by the difference between the sum of $650.00 per share for which such stock could and should have been purchased and its actual value, amounting to the sum of $2,400.00 per share, which the Trust could have secured as a result of the tender offer to its stockholders made by the Birmingham Realty Company on or about May 1976.

"The Court further finds that BTNB's evidenced conflict of interest is so inherent in the nature of its relationship to the Trust and to the Co-Trustee, Henley, as to render BTNB unable to further serve as Co-Trustee to the instant Trust Estate; and that the resolution of the instant controversy will not dissolve this conflict of interest so as to render BTNB fully competent and qualified to continue to thusly serve as Co-Trustee.

"Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

"*ONE:* That the Linn-Henley Charitable Trust shall have and recover of Birmingham Trust National Bank the sum of FOUR HUNDRED SEVENTY TWO THOUSAND THREE HUNDRED TWELVE AND NO/100 DOLLARS ($472,312.00), together with interest thereon at the rate of six percent per annum from January 1, 1969 to September 1, 1977, amounting to the sum of TWO HUNDRED THIRTY THOUSAND NINE HUNDRED SIXTY AND NO/100 DOLLARS ($230,960.00), or the

total sum of SEVEN HUNDRED THREE THOUSAND TWO HUNDRED SEVENTY TWO AND NO/100 DOLLARS ($703,272.00), the same representing the difference between the actual, intrinsic value of the 'Old' Bank stock and the value determined by the Comptroller of the Currency, pursuant to the directions of the Supreme Court, together with the costs of litigation and a reasonable attorneys' fee, attributable to this claim, which the Court hereby reserves for future determination to be made upon application of the parties for reimbursement of such costs and expenses, including attorneys' fees.

"*TWO:* It is further ORDERED, ADJUDGED and DECREED by the Court that the Linn-Henley Charitable Trust shall have and recover of the Counter-Defendants, Birmingham Trust National Bank and Southern Bancorporation of Alabama the sum of ONE MILLION TWO HUNDRED EIGHT THOUSAND TWO HUNDRED FORTY AND NO/100 DOLLARS ($1,208,240.00), the same representing the profits accruing upon the 'Holding Company' stock to the Counter-Defendants acquired by them at the public auction held on February 10, 1970.

"*THREE:* It is further ORDERED, ADJUDGED and DECREED that the Linn-Henley Charitable Trust shall have and recover of the Counter-Defendant, Birmingham Trust National Bank, the sum of NINE HUNDRED SIXTY NINE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($969,500.00), the same representing the profits lost to the Trust by virtue of the breaches of its fiduciary duties in failing to concur with the individual Co-Trustee in the purchase of the 554 shares of stock of Birmingham Realty Company.

"*FOUR:* It is further ORDERED, ADJUDGED and DECREED that Birmingham Trust National Bank is hereby removed and discharged as Trustee for the Linn-Henley Charitable Trust. In the place and stead of BTNB, The First National Bank of Birmingham is hereby named as Trustee of the Linn-Henley Charitable Trust upon its acceptance of this nomination and appointment.

"*FIVE:* It is further ORDERED, ADJUDGED and DECREED that all costs of litigation, including reasonable attorneys' fees applicable to the establishment of liability to the 'Old Bank' and its stockholders, and the suc-

cessor, the 'New Bank' incident to the circulation of the fraudulent or misleading proxy statement, in violation of the securities and other laws, as set out in the additional findings of fact and conclusions of law of the Temporary Trustee made a part hereof, shall be charged against the Counter-Defendant, Birmingham Trust National Bank.

"*SIX:* The fixing and awarding of attorneys' fees costs of litigation and expenses and compensation to the Temporary Trustee is hereby reserved along with a determination of the question as to whom the said costs, expenses and attorneys' fees shall be charged.

"*SEVEN:* Counsel for the separate parties, (including the Temporary Trustee), are instructed to furnish to the Court their sworn applications for allowance of fees and expenses which they may claim, along with any supporting affidavits, within 15 days of the date of this instant decree, along with their claims and suggestions as against whom these fees and expenses should be charged; and the Counter-Defendant, BTNB, is hereby taxed with all taxable costs of this action, for which let execution issue.

"DONE and ORDERED this 4th day of October, 1977.

"/s/ WM. C. BARBER

CIRCUIT JUDGE IN EQUITY
SITTING"

BTNB appealed, claiming error in all aspects of the decree. The attorney general and Henley, as Co-Trustee, cross-appealed from that aspect of the decree which taxed costs and attorneys' fees against the Trust.

At the outset, it should be noted that no party argues that the plan of reorganization adopted by the majority stockholders was made for the purpose of squeezing or freezing out minority stockholders on a cash out basis. In fact, it is not argued that the bank breached its fiduciary duties to minority stockholders. The only contention made is that the bank breached its duty to the Trust in various ways. We shall address these theories in the sequence set out in the remand order in the opinion delivered on the prior appeal.

I.

Did BTNB breach its duty to the Trust by failing to furnish data to the Comptroller of the Currency which would have produced a higher appraisal of the old bank stock than $32.80 per share as originally fixed?

BTNB argues now, as it did on the prior appeal, that the provisions of § 215a(d), Title 12, USC, to the effect that the Comptroller's appraisal "shall be final and binding on all parties" forecloses any question that the appraisal may not have been sufficient in amount. A majority of the court rejected that argument on the prior appeal, holding that if the bank breached its fiduciary duty to the Trust by withholding data which would be material to the Comptroller in making a valid appraisal, it was answerable to the Trust under state law. We adhere to that position.

It was the opinion of the majority that the language of § 215a(d), making the appraisal final and binding on all parties was not intended by the Congress to preempt state law in the area of fiduciary duties of a national bank serving in a fiduciary position. In fact, the act itself implicitly recognizes the role of state law in this area. § 215a(f) recognizes that a national bank acting as a fiduciary under appointment by a state court is subject to supervision or removal by that court, saying:

> ". . . Nothing contained in this section [215] shall be considered to impair in any manner the right of any court to remove the consolidated national banking association and to appoint in lieu thereof a substitute . . . fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any consolidated national banking association be removed solely because of the fact that it is a national banking association."

Additionally, the act itself refutes the contention that the appraisal is final and binding on all parties for all purposes. The appraisal is not binding on either party if at the public

auction required to be held a price greater than the appraisal is received. In that event, the dissenting stockholder is entitled to receive the amount in excess of the appraisal.

Thus, as we read § 215, state courts are not foreclosed to inquire into the question of breach of fiduciary duty on the part of a national bank or a state bank involved in consolidation and merger as provided for by that act.

On the retrial of this case, the trial court determined that BTNB withheld data from the Comptroller of the Currency which reflected on the actual, intrinsic or fair value of the stock held in trust as of December 31, 1968. Based upon evidence before it, the court determined that the value of the stock was $50 per share as opposed to $32.80 fixed by the appraisal and awarded to the Trust the difference, plus interest from January 1, 1969, to September 1977, for a total award of $703,272.00. We affirm. The cause was remanded for a determination of this issue and there is evidence in the record as shown by the final decree to support the finding. Therefore, we should not disturb this finding by the court.

II.

On remand, the trial court was instructed to award to the Trust the difference in the value as determined by an appraisal (with all pertinent data taken into consideration) and the "true" bid value of the stock at auction, if that amount were higher than the appraisal figure. The trial court conceded its inability to carry out this mandate, and instead awarded to the Trust the difference in the amount paid for the stock by the holding company at the auction, $26 per share, and the highest intermediate value of the stock up to time of trial, $70 per share, for a total of $1,208,240. The theory advanced by the temporary trustee and the basis of this award in the court's decree, was that BTNB breached its duty to the Trust in refusing to purchase the stock for the Trust. Curiously, the temporary trustee pursued this theory even though Henley, on the first trial, argued that BTNB was guilty of a breach of duty

in recommending that the Trust accept shares of stock in the new bank holding company in exchange for old bank stock.

The auction is statutorily mandated as a second step in the dissent procedure. It appears to be designed to further protect the rights of stockholders who exercise their right to dissent from the plan of merger or consolidation. If the stock brings a price higher than that for which it was appraised, the dissenting stockholders reap the benefit. The act expressly permits the purchase of the shares by the surviving banking association. The temporary trustee candidly admits that the stock could not possibly have brought a price at the auction in excess of the $32.80 per share which the Trust had been paid based on the appraisal. He obviously concedes, therefore, that it would not have attracted a bid in excess of the $50 per share which the court has now determined was the true appraisal value. Henley, the co-trustee, himself recognized that the stock would not attract bidders at over $32.80 and urged the investment for the Trust only up to a price of $23.25. He and the temporary trustee now contend that the trust is entitled to the difference in the price paid at auction and the highest market price since that time, not because the bid price did not reflect the true value of the stock, but because the bank refused to purchase the stock for the Trust. Admittedly, it now appears that the stock would have been a good investment for the Trust, or for anyone else for that matter. But, the duty of the bank in its relation to the Trust must be measured against circumstances which existed at the time the alleged breach of its fiduciary duty occurred. The bank had a duty to conduct a meaningful public auction of the stock which the dissenting stockholders would have received in exchange for the stock they held but for their election to dissent from the plan of reorganization. The temporary trustee argues that the bank can be charged with breach of this duty by virtue of the plan of reorganization it elected to pursue. It is quite true that § 215, supra, does not contemplate the exact type of reorganization which management and the majority stockholders of BTNB adopted. That plan has heretofore been set out. It was,

therefore, not entirely clear what stock should be offered at the auction, whether the stock of the new national bank or stock of the holding company. To resolve any question about this issue, both were offered. There was no evidence offered and no contention made that the price bid in each instance was not reflective of the fair market price then prevailing. That either stock was being offered at auction was a direct result of Henley as the individual co-trustee having exercised his statutory right to vote the stock held in trust against the plan of reorganization. He had a perfect legal right to so vote those shares. However, nothing in the law imposes liability on BTNB as co-trustee in rejecting Henley's proposal to then purchase as an investment for the Trust the very stock it would have received in exchange for the old stock had Henley not voted those shares against the plan of merger/reorganization. This is so assuming that the stock could have been legally acquired by the co-trustee as an investment for the Trust.

The general definition of a trustee's investment duties was first stated by the Supreme Court of Massachusetts in *Harvard College v. Amory*, Mass. (9 Pick.) 446, 461 (1830):

> "All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

The Restatement of the Law of Trusts 2d, § 227 (1959), states the rule in the following language:

> "In making investments of trust funds the trustee is under a duty to the beneficiary
>
> "(a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived. . . ."

The general rule is, absent express authority in the trust instrument, a corporate trustee is guilty of a breach of fiduciary duty where it purchases property which it owns for a trust administered by it. II Scott on Trusts, § 170.13 (3d ed. 1967).

> "Unless authorized to do so by the terms of the trust, or by statute, a corporate trustee cannot, as a general rule, properly make or retain a trust investment in its own stock or bonds. Such a transaction involves self-dealing, or at least, divided loyalty. . . ." (54 Am.Jur., Trusts, § 413)

A regulation to like effect has been adopted by the Comptroller of the Currency binding national banks. 12 C.F.R. § 9.12(a).

In fact, Title 12, § 83, USC, prohibits the purchase or retention by a national bank of its own stock for its own account. This, of course, explains why § 215a(d), although allowing a banking association to purchase the shares of dissenting shareholders at auction, expressly says it may do so only "for the purpose of reselling such shares within 30 days. . . ."

BTNB was a co-trustee of the Linn-Henley Trust. Multiple trustees must act jointly and in concert and may not delegate to each other or to another powers calling for discretion and judgment. Restatement of the Law of Trusts 2d, § 194. It is assumed that a settlor generally appoints more than one trustee because of his desire to attain for the beneficiaries of his trust the benefit of the wisdom of each, and the courts will not, as a general rule, interfere with the exercise of discretionary powers of trustees absent fraud or abuse of discretion. See: The Co-Trustee Relationship, Vol. 8.9 Real Property, Probate & Trust Journal (Spring 1973).

Tested by these standards, did BTNB breach its duty to the Trust in refusing to acquiesce in Henley's suggestion to acquire as an investment for the Trust the stock offered at auction?

We hold that it did not and reverse that part of the decree of the trial court so holding.

One of this state's outstanding attorneys, while representing the Linn-Henley Trust, expressed grave doubt that the co-

trustees had the power under the Trust to convert the inherited stock in the bank to stock in the holding company in connection with the merger/reorganization. In other words, an attorney while representing the Trust, questioned whether the Trust could properly hold stock in the holding company assuming it did not dissent from the plan of reorganization. Under these facts. we cannot hold as a matter of law that BTNB breached any fiduciary duty in refusing to purchase shares in the holding compar.y or "new" bank stock as a new investment for the Trust.

III.

Was BTNB guilty of a breach of its fiduciary duties in refusing to concur in Henley's recommendation that the Trust purchase 554 shares of Birmingham Realty Company stock in September, 1970?

Undeniably, a trustee owes undivided loyalty to the Trust. This does not mean, however, that he is liable for a loss to the trust estate which did not result from a breach of that duty. III Scott on Trusts, §§ 204, 211 (3d ed. 1967).

The temporary trustee asserts that the court held on the first appeal that BTNB had breached its duty to the Trust in refusing to buy the Birmingham Realty stock. This is erroneous. The issue was remanded for a determination of whether BTNB had abused "its discretion in refusing to agree to the purchase." The temporary trustee argues that BTNB should be held liable to the Trust for its "deliberate disregard of foresight."

BTNB is liable to the Trust in the Birmingham Realty matter only if it breached some duty to the Trust in refusing to make this investment at the time the decision was made. Was it an investment which a prudent man, managing his own affairs, would have made, based upon information then available? Liability cannot be based on the fact it subsequently developed that the investment would have been a good one. This is but the converse of the rule that a trustee is not liable if he makes an investment in a security which subsequently de-

preciates in value. III Scott on Trusts, § 204, supra, expresses the rule as follows:

> "The failure to make a profit which does not result from a breach of trust does not subject the trustee to liability. Thus if by the terms of the trust he is permitted but is not directed to invest in certain securities, he is not liable for failure to make the investment, although the securities subsequently appreciate in value. . . ."

The rule has also been summarized by Headley, *Trust Investments*, 110 Trusts & Estates 739 (1952), as follows:

> "The first and all inclusive requirement of the law is that a trustee shall act with complete and undivided loyalty to his trust. Second is that a trustee shall act prudently in the selection and management of investments. The elements of prudence are:
>
> "(1) Care – a trustee must gather and weigh the facts and base his decisions on them rather than on rumor or guesswork;
>
> "(2) Skill – a trustee must exercise the skill of the average person as a minimum; and if he has more than average skill he must exercise such skill as he has;
>
> "(3) Caution – a trustee must not take chances which will imperil the accomplishment of the purposes of the trust.
>
> ". . .
>
> ". . . There must be balance between security of principal and amount and regularity of income; and the governing motive of the trustee must be sound investment for a long period and not speculation for a profit. . . ."

With specific reference to a trustee's investing in common stocks, this author says:

> ". . . They represent no promise to return a dollar amount to the investor; their dividends are dependent on earnings and the action of a board of directors; they have always afforded an attractive vehicle for speculation. Nevertheless some of them have demonstrated, over a long period of years, the qualities required for sound permanent investments. Intrinsic values have been maintained and

> dividends have been adequate and regular. The principal has been reasonably safe for a number of reasons: competent management, sound financing, position in an essential industry, a successful record and an adequate market. . . ."

Tested by this standard, we cannot say that BTNB breached its duty to the Linn-Henley Trust in declining to invest its funds in stock of Birmingham Realty Company in 1970. The Trust instrument permitted the co-trustees wide discretion in making investments, but it did not direct them to invest in any particular security. In this instance, the co-trustees disagreed on the advisability of investing trust funds in Birmingham Realty stock. Henley urged the investment partly because the price at which the 554 shares could be purchased in 1970 was below book value and because the real estate holdings of Birmingham Realty had a market value far in excess of the value carried on the books of the company. Although the latter fact was widely known, stock in Birmingham Realty had traditionally sold at less than book value. One explanation for this was that the dividends paid were also traditionally low. The only way the underlying value of the real estate could be realized by the stockholders was liquidation, which was not practical.

There were a number of witnesses, knowledgeable about Birmingham Realty and themselves experts in the investment field, who testified that they had been willing to pay substantially more than market for *all* of the stock but would not be interested in less than all at a substantially lower price. Each of the witnesses testified that in 1970 Birmingham Realty stock was not a good investment for the Trust.

The record demonstrates that there existed a number of sound reasons for BTNB to reject Henley's proposal to make this investment. It fails to show wherein it was under a duty to do so. Therefore, it cannot be surcharged for its actions absent a showing of breach of some duty on its part. Consequently, that part of the court's decree awarding damages to the trust in the amount of $969,500 for failure of BTNB to concur in

the purchase of 554 shares of Birmingham Realty Company is reversed.

IV.

Was BTNB properly removed as a co-trustee for the Linn-Henley Trust?

The settlor of this Trust, over a period of 45 years, served as a director, president and, finally, chairman of the Board of BTNB. In designating the bank as co-executor and as co-trustee of his charitable trust he specified by his will that:

> ". . . the Birmingham Trust National Bank, a national banking association (or such successor corporation as shall succeed said Birmingham Trust National Bank by purchase, merger, consolidation, conversion or change of charter or name)."

The law governing removal of trustees is very clear in this state as elsewhere.

In II Scott on Trusts (3d ed. 1967), the following appears:

> "§ 107. A court which has supervision over the administration of trusts has power to remove a trustee for proper cause. Unless the grounds of removal are stated in a statute, and unless the grounds so stated are exclusive, the matter is one for the exercise of a sound discretion by the court. . . .
>
> "§ 107.1. The court is less ready to remove a trustee who was named by the settlor than it is to remove a trustee appointed by the court or by a third person in the exercise of a power to appoint trustees. . . ."

Also, in IV Scott on Trusts (3d ed. 1967):

> "§ 387. A trustee of a charitable trust may be removed as trustee for the same reasons for which a trustee of a private trust may be removed. Thus he may be removed for serious breaches of trust, for unfitness, for long-continued absence and the like. He can also be removed where his views are hostile to the purposes of the trust. . . ."

This court has stated the rule which prevails in this state:

"The removal of a trustee is a drastic action which should only be taken when the estate is actually endangered and intervention is necessary to save trust property. In re Crawford's Estate, 30 Pa. 187, 16 A.2d 521; In re Hodgson's Estate, 342 Pa. 250, 20 A.2d 294; Chambers v. Mauldin, 4 Ala. 127; Satterfield v. John, 53 Ala. 127. This is especially true where the trustee is named by the settlor. In re Crawford's Estate, supra; Taylor v. Errion, 137 N.J. Eq. 221, 44 A.2d 346, affirmed 140 N.J.Eq. 495, 55 A.2d 11.

"While the removal of a trustee is a matter resting largely within the sound judicial discretion of the trial court, it is equally clear that an abuse of that discretion renders its exercise subject to review. . . ." *Ingalls v. Ingalls,* 257 Ala. 521, 527, 59 So.2d 898 (1952)

See also: *Walker v. Amason* (MS. April 6, 1979), ___ So.2d ___ (Ala. 1979).

We have tediously reviewed the record in this case, which is voluminous, as one would expect in a trial lasting six weeks or more, and while we find evidence that the relationship between officers of BTNB and John Henley became strained during the merger/reorganization process and each of them took different positions as to what was in the best interests of the Trust, there is nothing to indicate the trust estate was endangered at any time. BTNB was in an awkward position in connection with the appraisal of the bank's stock held in trust. Its undivided loyalty to the Trust required it to attempt to have the stock appraised at a figure to obtain for the Trust the highest amount possible. It had a statutory obligation as "the receiving association" under Title 12, § 215a(d), to promptly pay the appraised amount to the dissenting shareholders. These conflicting obligations could not be reconciled and BTNB should have, as we held on the first appeal, sought guidance from the court. However, its failure to do so does not require its removal as a co-trustee. A similar situation is unlikely ever to recur and its having occurred one time does not disqualify BTNB from fulfilling its obligations under the trust instrument. Henley conceded that he and the bank's trust depart-

ment had worked harmoniously in the discharge of their respective responsibilities to the Trust except for the matters concerned in this litigation and could continue to do so. We find nothing in the record to indicate otherwise. Therefore, that portion of the decree removing BTNB as co-trustee of the Linn-Henley Trust is reversed.

V.

The matter of attorneys' fees and costs:

The attorney general and Henley appealed that part of the decree awarding attorneys' fees from the Trust. They argue that those fees should be paid by BTNB and urge that the court erred in taxing them as costs against the Trust. They contend that the decree is in all other respects without error, except that Henley questions the amount of the award in fees to attorneys for the temporary trustee and for the services of the temporary trustee himself. BTNB asserts that the court properly taxed costs and attorneys' fees against the Trust, but also questions the amount of attorneys' fees awarded to various parties.

The trial court correctly held that such costs and attorneys' fees as are awardable may, under our law, be taxed against the Trust. Code 1975, § 34-3-60.

In *Zimmerman v. First National Bank of Birmingham*, 348 So.2d 1359, 1367 (Ala. 1977), we addressed this issue and stated the rule as follows:

> "According to a well-established line of cases,
>
> " '[s]ection 63, Title 46, Code, is largely an enactment of the ancient principle of equitable origin, and there enforceable, which was referred to as costs between solicitor and client and said statute makes it apply at law as well as in equity when justified. That principle is that a complainant in equity, who at his own expense has maintained a successful suit for the preservation protection or increase of a common fund or of common property, or who has *created at his own expense or brought into court* a fund in which others may share,

> may have paid to him, or sometimes directly to his attorney, an attorney's fee for such services.
>
> "Penny v. Pritchard & McCall, 255 Ala. 13, 17, 49 So.2d 782 (1950). . . ."

Therefore, that part of the decree taxing attorneys' fees against the Trust, and made the basis of Henley and attorney general's cross-appeal, is AFFIRMED.

Because we reverse the trial court's decree with regard to issues delineated in Sections II, III and IV herein, we must remand the attorneys' fee issue for reconsideration by the trial court in light of this opinion. It should determine the time spent and the contribution made by whom in connection with the issue in Section I (the appraisal issue) and fix attorneys' fees accordingly.

AFFIRMED AS TO SECTION I; REVERSED AND RENDERED AS TO SECTIONS II, III, AND IV; AND REMANDED WITH DIRECTIONS AS TO AMOUNT OF ATTORNEYS' FEES.

Torbert, C. J., and Bloodworth, Jones, Almon, Embry and Beatty, JJ., concur.

Maddox, J., dissents as to Section I, and concurs in the remainder.

Faulkner, J., not sitting.

MADDOX, JUSTICE (Concurring in part and dissenting in part).

I dissent as to Part I, on some of the same grounds which I advanced, and which former Chief Justice Howell Heflin advanced, in our separate dissents on the original appeal. 295 Ala. at pages 50 and 56.

Even though this case involves thousands of dollars, the basic and controlling facts are undisputed. BTNB, as a co-trustee wanted to merge. Co-trustee Henley opposed merger. Under national banking laws, Henley, as co-trustee, became, in effect, the *sole* trustee in the merger proceeding. Exercising his right, he dissented, thus triggering the process of stock evaluation,

sale at public auction, etc. The procedure outlined by federal law was followed in the merger proceeding. During the merger proceeding, Henley, because of the mandate of federal law, was the "dissenting stockholder."

The majority upholds a finding by the trial court that the bank acted in bad faith at the evaluation stage. The evidence is uncontradicted that BTNB urged merger. Had Henley, as *sole* trustee, not dissented, there never would have been any necessity for the subsequent events, which Henley now complains about. In short, had Henley followed the advice of BTNB, the Trust estate would have been substantially benefited, not harmed. Why then should BTNB be accused of bad faith and be saddled with a loss resulting from an event over which it had no control, Henley's dissent?

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 24 day of Aug. 1979.

J.O. Sentell

Clerk, Supreme Court of Alabama

APPENDIX A(2)

ORDER DENYING
APPLICATION FOR REHEARING
JUNE 8, 1979

77-382

BIRMINGHAM TRUST NATIONAL BANK, ET AL.

VS.

JOHN C. HENLEY, III, ET AL.

77-382A

CHARLES A. GRADDICK, ATTORNEY GENERAL

VS. JEFFERSON CIRCUIT COURT #168-659

BIRMINGHAM TRUST NATIONAL BANK, ET AL.

77-382B

JOHN C. HENLEY, II

VS.

BIRMINGHAM TRUST NATIONAL BANK, ET AL.

IT IS ORDERED that the applications for rehearing filed in this cause on April 20, 1979, be, and the same are hereby, overruled.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 24 day of Aug. 1979.

J.O. Sentell

Clerk, Supreme Court of Alabama

APPENDIX B(1)

PERTINENT PROVISIONS OF TITLE 12 U.S.C.A. RELATING TO THE MERGER OF NATIONAL BANKS AND PERTINENT PROVISIONS OF THE REGULATIONS OF THE COMPTROLLER OF THE CURRENCY WITH RESPECT THERETO

§ 215a. Merger of national banks or State banks into national banks — Approval of Comptroller, board and shareholders; merger agreement; notice; capital stock; liability of receiving association

(a) One or more national banking associations or one or more State banks, with the approval of the Comptroller, under an agreement not inconsistent with sections 215-215b of this title, may merge into a national banking association located within the same State, under the charter of the receiving association. The merger agreement shall —

(1) be agreed upon in writing by a majority of the board of directors of each association or State bank participating in the plan of merger;

(2) be ratified and confirmed by the affirmative vote of the shareholders of each such association or State bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of a State bank if the laws of the State where it is organized so require, at a meeting to be held on the call of the directors, after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation published in the place where the association or State bank is located, or, if there is no such newspaper, then in the newspaper of general circulation published nearest thereto, and after sending such notice to each shareholder of record by certified or registered mail at least ten days prior to the meeting, except to those shareholders who specifically waive notice, but any additional notice shall be given to the shareholders of such

State bank which may be required by the laws of the State where it is organized. Publication of notice may be waived, in cases where the Comptroller determines that an emergency exists justifying such waiver, by unanimous action of the shareholders of the association or State bank;

(3) specify the amount of the capital stock of the receiving association, which shall not be less than that required under existing law for the organization of a national bank in the place in which it is located and which will be outstanding upon completion of the merger, the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association; and

(4) provide that the receiving association shall be liable for all liabilities of the association or State bank being merged into the receiving association.

Dissenting shareholders

(b) If a merger shall be voted for at the called meetings by the necessary majorities of the shareholders of each association or State bank participating in the plan of merger, and thereafter the merger shall be approved by the Comptroller, any shareholder of any association or State bank to be merged into the receiving association who has voted against such merger at the meeting of the association or bank of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of merger, shall be entitled to receive the value of the shares so held by him when such merger shall be approved by the Comptroller upon written request made to the receiving association at any time before thirty days after the date of consummation of the merger, accompanied by the surrender of his stock certificates.

Valuation of shares

(c) The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the merger, by

an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the receiving association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a re-appraisal to be made which shall be final and binding as to the value of the shares of the appellant.

Application to shareholders of merging associations: Appraisal by Comptroller; expenses of receiving associations; sale and resale of shares; State appraisal and merger law

(d) If, within nine days from the date of consummation of the merger, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal or the appraisal, as the case may be, shall be paid by the receiving association. The value of the shares ascertained shall be promptly paid to the dissenting shareholders by the receiving association. The shares of stock of the receiving association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the receiving association at an advertised public auction, and the receiving association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders, the excess in such sale price shall be

paid to such dissenting shareholders. The appraisal of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases, rather than as provided in this section, if such provision is made in the State law; and no such merger shall be in contravention of the law of the State under which such bank is incorporated. The provisions of this subsection shall apply only to shareholders of (and stock owned by them in) a bank or association being merged into the receiving association.

Status of receiving association; property rights and interests vested and held as fiduciary

(e) The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger, subject to the conditions hereinafter provided.

Removal as fiduciary; discrimination

(f) Where any merging bank or banking association, at the time of the merger, was acting under appointment of any court

as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or committee of estates of lunatics, or in any other fiduciary capacity, the receiving association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such merging bank or banking association prior to the merger. Nothing contained in this section shall be considered to impair in any manner the right of any court to remove the receiving association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any receiving association be removed solely because of the fact that it is a national banking association.

Issuance of stock by receiving association; preemptive rights

(g) Stock of the receiving association may be issued as provided by the terms of the merger agreement, free from any preemptive rights of the shareholders of the respective merging banks. Nov. 7, 1918, c. 209, § 2, as added Sept. 8, 1959, Pub.L. 86-230, § 20, 73 Stat. 463.

§ 215b. Definitions

As used in sections 215-215b of this title, the term —

(1) "State bank" means any bank, banking association, trust company, savings bank (other than a mutual savings bank), or other banking institution which is engaged in the business of receiving deposits and which is incorporated under the laws of any State, or which is operating under the Code of Law for the District of Columbia (except a national banking association located in the District of Columbia);

(2) "State" means the several States and Territories, the Commonwealth of Puerto Rico, the Virgin Islands, and the District of Columbia;

(3) "Comptroller" means the Comptroller of the Currency; and

(4) "Receiving association" means the national banking association into which one or more national banking associations or one or more State banks, located within the same State, merge.

Nov. 7, 1918, c. 209, § 3, as added Sept. 8, 1959, Pub.L. 86-230, § 20, 73 Stat. 465.

Regulation 12 C.F.R., § 11.6, Schedule B, Item 9, dealing with solicitation of proxies:

"Item 9. Mergers, consolidations, acquisitions, and similar matters.

(a) If action is to be taken with respect to a merger, consolidation, acquisition, or similar matter, furnish in brief outline the following information:

(1) *The rights of appraisal or similar rights of dissenters with respect to any matter to be acted upon, and indicate any statutory procedure required to be followed by dissenting security holders in order to perfect such rights.*" (Italics ours)

7.4015. Solicitation of proxies for shareholders' meeting

(a) Comptroller's Regulation

Solicitation of a proxy with respect to stock of a national bank having a class of equity securities held of record by 750 or more persons (after May 1, 1967, 500 or more persons) is subject to Regulation 11 (12 CFR 11).

APPENDIX B(2)

PERTINENT PROVISIONS OF TITLE 12 U.S.C.A. RELATING TO TRUST POWERS OF NATIONAL BANKS

§ 92a. Trust powers – Authority of Comptroller of the Currency

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonks, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Grant and exercise of powers deemed not in contravention of State or local law

(b) Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

Segregation of fiduciary and general assets; separate books and records; access of State banking authorities to reports of examinations, books, records, and assets

(c) National banks exercising any or all of the powers enumerating in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as

such reports relate to the trust department of such bank, but nothing in this section shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

Prohibited operations; separate investment accounts; collateral for certain funds used in conduct of business

(d) No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

Lien and claim upon bank failure

(e) In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

Deposits of securities for protection of private or court trusts; execution of and exemption from bond

(f) Whenever the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law. National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement. National banks shall have power to execute such bond when so required by the laws of the State.

Officials' oath or affidavit

(g) In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

Loans of trust funds to officers and employees prohibited; penalties

(h) It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

Considerations determinative of grant or denial of applications; minimum capital and surplus for issuance of permit

(i) In passing upon applications for permission to exercise the powers enumerated in this section, the Comptroller of the Currency may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to him proper, and may grant or refuse the application accordingly: *Provided*, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

Surrender of authorization; board resolution; Comptroller certification; activities affected; regulations

(j) Any national banking association desiring to surrender its right to exercise the powers granted under this section, in

order to relieve itself of the necessity of complying with the requirements of this section, or to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, or for any other purpose, may file with the Comptroller of the Currency a certified copy of a resolution of its board of directors signifying such desire. Upon receipt of such resolution, the Comptroller of the Currency, after satisfying himself that such bank has been relieved in accordance with State law of all duties as trustee, executory, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or other fiduciary, under court, private or other appointments previously accepted under authority of this section, may, in his discretion, issue to such bank a certificate certifying that such bank is no longer authorized to exercise the powers granted by this section. Upon the issuance of such a certificate by the Comptroller of the Currency, such bank (1) shall no longer be subject to the provisions of this section or the regulations of the Comptroller of the Currency made pursuant thereto, (2) shall be entitled to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, and (3) shall not exercise thereafter any of the powers granted by this section without first applying for and obtaining a new permit to exercise such powers pursuant to the provisions of this section. The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein. Pub.L. 87-722, § 1, Sept. 28, 1962, 76 Stat. 668.

APPENDIX B(3)

PERTINENT PROVISIONS OF THE REGULATIONS OF THE COMPTROLLER OF THE CURRENCY RELATING TO THE FIDUCIARY POWERS AND OBLIGATIONS OF NATIONAL BANKS

PART 9–FIDUCIARY POWERS OF NATIONAL BANKS AND COLLECTIVE INVESTMENT FUNDS

[12 CFR 9]

Sec.

AUTHORITY: §§ 9.1 to 9.19 issued under Section 1(j) of the Act of September 28, 1962, 76 Stat. 668, 12 U.S.C. 92a.

§ 9.1 Definitions.

For the purposes of this part, the term:

(a) "Account" means the trust, estate or other fiduciary relationship which has been established with a bank;

(b) "Equity security" means any stock; or similar security convertible, with or without consideration, into such a security; or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Comptroller of the Currency shall deem to

be of similar nature and considers necessary or appropriate to treat as an equity security in the public interest;

(c) "Fiduciary" means a bank undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking and includes trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, managing agent and any other similar capacity;

(d) "Fiduciary powers" means the power to act in any fiduciary capacity authorized by the Act of September 28, 1962, 76 Stat. 668, 12 U.S.C. 92a. Under that Act, a national bank may be authorized to act, when not in contravention of local law, as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity which state banks, trust companies, or other corporations which come into competition with the national bank may exercise under local law;

(e) "Fiduciary records" means all matters which are written, transcribed, recorded, received or otherwise come into the possession of a bank and are necessary to preserve information concerning the acts and events relevant to the fiduciary activities of a bank;

(f) "Guardian" means the guardian or committee, by whatever name employed by local law, of the estate of an infant, an incompetent individual, an absent individual, or a competent individual over whose estate a court has taken jurisdiction, other than under bankruptcy or insolvency laws;

(g) "Investment authority" means the responsibility conferred by action of law or a provision of an appropriate governing instrument to make, select or change investments, review investment decisions made by others, or to provide investment advice or counsel to others;

(h) "Local laws" means the law of the State or other jurisdiction governing the fiduciary relationship;

(i) "Managing agent" means the fiduciary relationship assumed by a bank upon the creation of an account which names

the bank as agent and confers investment discretion upon the bank;

(j) "State bank" means any bank, trust company, savings bank, or other banking institution, which is not a national bank and the principal office of which is located in the District of Columbia, any state, commonwealth, or territorial possession of the United States;

(k) "Trust department" means that group or groups of officers and employees of a bank organized under the supervision of officers or employees to whom are designated by the board of directors the performance of the fiduciary responsibilities of the bank, whether or not the group or groups are so named.

(*l*) "Bank" shall include two or more banks which are members of the same affiliated group with respect to any fund established pursuant to § 9.18 of which any such affiliated banks is trustee, or two or more of such affiliated banks are co-trustees.

(m) "Custodian under a uniform gifts to minors act" means an account established pursuant to a state law which is substantially similar to the Uniform Gifts to Minors Act as published by the American Law Institute and with respect to which the bank operating such account has established to the satisfaction of the Secretary of the Treasury that it has duties and responsibilities similar to duties and responsibilities of a trustee or guardian.

§ 9.2 Applications.

A national bank desiring to exercise fiduciary powers shall file an application with the Comptroller of the Currency pursuant to 12 CFR 4.7b.

§ 9.3 Consideration of applications.

In passing upon the application to exercise fiduciary powers, the Comptroller of the Currency will give consideration to the following matters and to any other facts and circumstances that seem to him proper:

(a) Whether the bank has sufficient capital and surplus to exercise the fiduciary powers applied for, which capital and surplus in no case shall be less than that required by State law of State banks, or other institutions exercising such powers;

(b) The needs of the community for fiduciary services and the probable volume of such fiduciary business available to the bank;

(c) The general condition of the bank, including the adequacy of its capital and surplus in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, including the exercise of fiduciary powers;

(d) The general character and ability of the management of the bank;

(e) The nature of the supervision to be given to the fiduciary activities, including the qualifications, experience and character of the proposed officer or officers of the trust department;

(f) Whether the bank has available legal counsel to advise and pass upon fiduciary matters wherever necessary.

§ 9.4 Consolidation or merger of two or more national banks.

Where two or more national banks consolidate or merge, and any one of such banks has, prior to such consolidation or merger, received a permit from the Board of Governors of the Federal Reserve System or the Comptroller of the Currency to exercise fiduciary powers which is in force at the time of the consolidation or merger, the rights existing under such permit pass to the resulting bank, and the resulting bank may exercise such fiduciary powers in the same manner and to the same extent as the bank to which such permit was originally issued; and no new application to continue to exercise such powers is necessary. However, where the name or charter number of the resulting bank differs from that of the bank to which the right to exercise fiduciary powers was originally granted, in order that the records of the resulting bank may be complete and that it have convenient evidence of its right to exercise fiduciary

powers, the Comptroller of the Currency will issue a certificate to that bank showing its right to exercise the fiduciary powers theretofore granted to any of the national banks participating in the consolidation or merger.

§ 9.5 [Reserved]

§ 9.6 [Reserved]

§ 9.7 Administration of fiduciary powers.

(a)(1) The board of directors is responsible for the proper exercise of fiduciary powers by the bank. All matters pertinent thereto, including the determination of policies, the investment and disposition of property held in a fiducary capacity, and the direction and review of the actions of all officers, employees, and committees utilized by the bank in the exercise of its fiduciary powers, are the responsibility of the board. In discharging this responsibility, the board of directors may assign, by action duly entered in the minutes, the administration of such of the bank's fiduciary powers as it may consider proper to assign to such director(s), officer(s), employee(s) or committee(s) as it may designate.

(2) No fiduciary account shall be accepted without the prior approval of the board, or of the director(s), officer(s) or committee(s) to whom the board may have designated the performance of that responsibility. A written record shall be made of such acceptances and of the relinquishment or closing out of all fiduciary accounts. Upon the acceptance of an account for which the bank has investment responsibilities a prompt review of the assets shall be made. The board shall also ensure that at least once during every calendar year thereafter, and within 15 months of the last review, all the assets held in or for each fiduciary account where the bank has investment responsibilities are reviewed to determine the advisability of retaining or disposing of such assets.

(b) All officers and employees taking part in the operation of the trust department shall be adequately bonded.

(c) Every national bank exercising fiduciary powers shall designate, employ or retain legal counsel who shall be readily available to pass upon fiduciary matters and to advise the bank and its trust department.

(d) The trust department may utilize personnel and facilities of other departments of the bank, and other departments of the bank may utilize the personnel and facilities of the trust department only to the extent not prohibited by law.

§ 9.8 Books and accounts.

(a) Every national bank exercising fiduciary powers shall keep its fiduciary records separate and distinct from other records of the bank. All fiduciary records shall be so kept and retained for such time as to enable the bank to furnish such information or reports with respect thereto as may be required by the Comptroller of the Currency. The fiduciary records shall contain full information relative to each account.

(b) Every such national bank shall keep an adequate record of all pending litigation to which it is a party in connection with its exercise of fiduciary powers.

§ 9.9 Audit of trust department.

A committee of directors, exclusive of any active officers of the bank, shall at least once during each calendar year and within 15 months of the last such audit, make suitable audits of the trust department or cause suitable audits to be made by auditors responsible only to the board of directors, and at such time shall ascertain whether the department has been administered in accordance with law, this Regulation and sound fiduciary principles. The board of directors may elect, in lieu of such periodic audits, to adopt an adequate continuous audit system. A report of the audit and examination required under this section, together with the action taken thereon, shall be noted in the minutes of the board of directors.

§ 9.10 Funds awaiting investment or distribution.

(a) Funds held in a fiduciary capacity by a national bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

(b) Funds held in trust by a national bank, including managing agency accounts, awaiting investment or distribution may, unless prohibited by the instrument creating the trust or by local law, be deposited in the commercial or savings or other department of the bank, provided it shall first set aside under control of the trust department as collateral security:

(1) Direct obligations of the United States, or other obligations fully guaranteed by the United States as to principal and interest; or

(2) Readily marketable securities of the classes in which state banks exercising fiduciary powers are authorized or permitted to invest trust funds under the laws of the state in which such national bank is located; or

(3) Other readily marketable securities that qualify as investment securities pursuant to the Investment Securities Regulation of the Comptroller of the Currency (12 CFR 1).

The securities so deposited or securities substituted therefor as collateral shall at all times be at least equal in face value to the amount of trust funds so deposited, but such security shall not be required to the extent that the funds so deposited are insured by the Federal Deposit Insurance Corporation. The requirements of this section are met when qualifying assets of the bank are pledged to secure a deposit in compliance with local law, and no duplicate pledge shall be required in such case.

§ 9.11 Investment of funds held as fiduciary.

(a) Funds held by a national bank in a fiduciary capacity shall be invested in accordance with the instrument establishing the fiduciary relationship and local law. When such instru-

ment does not specify the character or class of investments to be made and does not vest in the bank, its directors or its officers a discretion in the matter, funds held pursuant to such instrument shall be invested in any investment in which corporate fiduciaries may invest under local law.

(b) If, under local law, corporate fiduciaries appointed by a court are permitted to exercise a discretion in investments, or if a national bank acting as fiduciary under appointment by a court is vested with a discretion in investments by an order of such court, funds of such accounts may be invested in any investments which are permitted by local law. Otherwise, a national bank acting as fiduciary under appointment by a court must make all investments of funds in such accounts under an order of that court. Such orders in either case shall be preserved with the fiduciary records of the bank.

(c) The collective investment of funds received or held by a national bank as fiduciary is governed by section 9.18.

(d) As a part of each examination of the trust department of a national bank and as provided by the Comptroller's Manual for Representatives in Trusts, the Comptroller of the Currency will examine the investments held by such bank as fiduciary, including the investment of funds under the provisions of section 9.18, in order to determine whether such investments are in accordance with law, this Regulation and sound fiduciary principles.

§ 9.12 Self-dealing.

(a) Unless lawfully authorized by the instrument creating the relationship, or by court order or by local law, funds held by a national bank as fiduciary shall not be invested in stock or obligations of, or property acquired from, the bank or its directors, officers, or employees, or individuals with whom there exists such a connection, or organizations in which there exists such an interest, as might affect the exercise of the best judgment of the bank in acquiring the property, or in stock or

obligations of, or property acquired from, affiliates of the bank or their directors, officers or employees.

(b) Property held by a national bank as fiduciary shall not be sold or transferred, by loan or otherwise, to the bank or its officers, or employees, or to individuals with whom there exists such a connection, or organizations in which there exists such an interest, as might affect the exercise of the best judgment of the bank in selling or transferring such property, or to affiliates of the bank or their directors, officers or employees, except:

(1) Where lawfully authorized by the instrument creating the relationship or by court order or by local law;

(2) In cases in which the bank has been advised by its counsel in writing that it has incurred as fiduciary a contingent or potential liability and desires to relieve itself from such liability, in which case such a sale or transfer may be made with the approval of the board of directors, provided that in all such cases the bank, upon the consummation of the sale or transfer, shall make reimbursement in cash at no loss to the account;

(3) As is provided in section 9.18(b)(8)(ii);

(4) Where required by the Comptroller of the Currency.

(c) Except as provided in section 9.10(b), funds held by a national bank as fiduciary shall not be invested by the purchase of stock or obligations of the bank or its affiliates unless authorized by the instrument creating the relationship or by court order or by local law: *Provided*, That if the retention of stock or obligations of the bank or its affiliates is authorized by the instrument creating the relationship or by court order or by local law, it may exercise rights to purchase its own stock or securities convertible into its own stock when offered pro rata to stockholders, unless such exercise is forbidden by local law. When the exercise of rights or receipt of a stock dividend results in fractional share holdings, additional fractional shares may be purchased to complement the fractional shares so acquired.

(d) A national bank may sell assets held by it as fiduciary in one account to itself as fiduciary in another account if the transaction is fair to both accounts and if such transaction is not prohibited by the terms of any governing instrument or by local law.

(e) A national bank may make a loan to an account from the funds belonging to another such account, when the making of such loans to a designated account is authorized by the instrument creating the account from which such loans are made, and is not prohibited by local law.

(f) A national bank may make a loan to an account and may take as security therefor assets of the account, provided such transaction is fair to such account and is not prohibited by local law.

APPENDIX B(4)

OPINION OF PROFESSOR LOUIS LOSS

March 15, 1977

Morris K. Sirote, Esquire
Sirote, Permutt, Friend, Friedman,
Held & Apolinsky, P.A.
Post Office Box 3364-A
Birmingham, Alabama 35205

Re: *Harrison v. Birmingham Trust National Bank*, et al.

Dear Mr. Sirote:

You have sent me a copy of the opinion of the Supreme Court of Alabama in *Henley v. Birmingham Trust National Bank*, 322 So.2d 687 (1975), pursuant to which the Circuit Court on remand appointed a temporary trustee of the Linn-Henley Charitable Trust "for the sole and limited purpose of the retrial of this cause" (id. at 696). You are counsel for that trustee. You have sent me also copies of your "Amended and Supplemental Counter Complaint" together with the answers of Birmingham Trust National Bank ("BTNB") and Southern Bancorporation of Alabama. And you have requested my opinion on a number of questions arising under the federal and Alabama securities laws.

The relevant facts, as I understand them, are as follows:

In October 1968 BTNB, purporting to act under the merger provisions in 12 U. S. C. §215a, formed Alabama National Bank as well as a Delaware corporation (BTNB Corporation) that was designed to act as a bank holding company, and merged the old bank into the new bank, which then took the name of the old bank. The net result was a "triangular merger," as it is sometimes called, with the non-dissenting stockholders of the old bank receiving stock of the holding company rather than stock of the new bank. The details of the Merger and Reorganization Plan are set out more fully in Count One of Part IV of the Amended and Supplemental Counter Complaint.

The assets of the Trust, whose co-trustees were BTNB and Mr. John C. Henley, III, consisted largely of 27,460 shares of BTNB stock. Under 12 U. S. C. § 61(3), which provides that, when a national bank and one or more individuals are co-trustees of a trust containing stock of the bank, the stock may be voted by the individual co-trustee as though he were sole trustee, Mr. Henley voted the 27,460 shares against the merger. But the merger was approved both by the requisite vote of the shareholders and by the Comptroller of the Currency.

Mr. Henley thereupon registered his dissent pursuant to 12 U. S. C. §215a(b). And, in the absence of the appointment of appraisers by either of the co-trustees pursuant to 12 U. S. C. §215a(c), BTNB asked the Comptroller to make an appraisal pursuant to 12 U. S. C. §215a (d). By letter dated January 21, 1970, the Comptroller advised BTNB that he had appraised the value of the BTNB stock as of December 31, 1968, before the merger, at $32.80 per share, for a total of $900,688, which was paid to the Trust.

There is a further provision in 12 U. S. C. §215a(d) to the effect that the shares of stock of the surviving bank that would have been delivered to dissenting shareholders if they had not requested payment shall be sold at an advertised public auction; that the surviving bank may buy any of the shares at the auction, if it is the highest bidder, for the purpose of resale within thirty days to whatever persons and at whatever price (not less than par) its board of directors determines; and that any excess of the auction price over the amount previously paid to dissenters shall be paid to them. In an attempt to comply with that provision BTNB published a newspaper advertisement of a public auction, with the statement

> These shares have not been registered under the Securities Act of 1933, and are offered for sale for investment only. Any purchaser of these shares will be required to pay cash and make appropriate investment representations in writing to issuer.

BTNB bought the block in the auction at $26 per share. Thereafter, Mr. Henley having objected that the sale of the

holding company stock did not constitute a sale of the stock of the "receiving association" (that is to say, the surviving bank) within the meaning of 12 U. S. C. §215a(d), BTNB purported to sell at public auction 27,460 shares of its own stock (notwithstanding the fact that all BTNB shares except qualifying shares had already become shares of the holding company pursuant to the reorganization), and the holding company bought the block at $24 per share.

On the basis of these facts, as more fully stated in the opinion of the Alabama Supreme Court and the Amended and Supplemental Counter Complaint, it is my opinion as follows:

First: Section 5 of the Securities Act of 1933 ("the 1933 Act"), 15 U. S. C. § 77e, makes it unlawful, in substance, for any person to offer or sell a security unless a registration statement is effective and a prospectus is delivered to each buyer. At the time of the events in question, and until January 1, 1973, the Securities and Exchange Commission's Rule 133, CCH Fed. Sec. L. Rep. ¶3011, provided, in substance, that no "offer" or "sale" was considered to be involved when stockholders were asked to vote on a "plan or agreement for a statutory merger" under such circumstances that a vote of a required favorable majority, "pursuant to statutory provisions in the state of incorporation or provisions contained in the certificate of incorporation," would bind all stockholders (subject only to any available appraisal rights for dissenters). The theory was that this sort of *group* action did not involve the kind of volitional element that was contemplated by Congress when it gave every offeree of a security the right to a federally policed registration statement and prospectus so that he could make up his own mind whether to invest on the basis of full and fair disclosure. On the history and development of this so-called "no sale" theory" – which was reversed by the adoption of Rule 145, CCH ¶ 3011A, effective January 1, 1973 – see 1 Loss, *Securities Regulation* (2d ed. 1961, Supp. 1969) 518-39.

In recognition of the amendment of §368(a)(1)(C) of the Internal Revenue Code in 1954 to accord tax-free reorganization

status to triangular mergers and similar transactions — whereby X is merged into Y, but X's stockholders receive stock in Z, Y's holding company, rather than stock in Y — the SEC in October 1954 amended Rule 133 accordingly. Sec. Act Rel. No. 3522, CCH ¶76,314, as further amended in a relatively minor respect not here relevant by Sec. Act Rel. No. 4892, CCH ¶77,516 (1968).

Rule 133 itself, however, does not determine when a triangular merger is possible. It simply operates in circumstances where such action is possible "pursuant to statutory provisions" in the state of incorporation (see, e. g., the reference to "securities of any other corporation" in Del. Gen. Corp. Law, 8 Del. Code §251(b)(4)) or provisions contained in the certificate of incorporation." I make nothing of the fact that Rule 133(a) referred to statutory provisions in "the state of incorporation" without mention of federal statutory provisions; that language presumably had something to do with the fact that bank securities are exempted from registration by §3(a)(2) of the 1933 Act, 15 U. S. C. §77c(a)(2), although neither that nor any other exemption extends to the securities of bank holding companies as such. Even so, Rule 133(a) had no room for operation unless there was an appropriate federal statutory provision on triangular mergers that would have applied to the plan here in question.

The fact is that 12 U. S. C. §215a(a) contemplates mergers only of "One or more national banking associations or one or more State banks * * * into a national banking association located within the same State." There is no reference to any sort of triangular merger whereby the requisite vote of shareholders and the approval of the Comptroller would bind shareholders to take stock of a bank *holding company* (subject to dissenters' appraisal rights).

In *Marcou v. Federal Trust Co.*, 268 A. 2d 629, 635 (Me. 1970), which involved a similar transaction that resulted in a bank holding company under Maine law without benefit of statutory authorization (except that there the surviving bank

was the old bank rather than the new bank, which the court referred to as "the phantom or interim bank"), the Supreme Judicial Court of Maine stated: "We need not speculate on why Bankshares, a banking holding company and not itself a bank, chose not to exchange its shares for shares of the present (bank), but to take the merger route with * * * the phantom or interim bank." In saying that, the court was obviously exercising appropriate judicial restraint. But no speculation is required. The simplest way for an existing bank to become the subsidiary of a bank holding company would be to cause the formation of a holding company, which would then tender its shares in exchange for the shares of the bank. The difficulty is that such a procedure, quite apart from its clearly not fitting within 12 U. S. C. §215a, would have required registration of the stock of the bank holding company under the 1933 Act even before the repeal of Rule 133; for Rule 133 did not apply to individual offers of exchange as distinct from group action. Accordingly, it is apparent that the artisans of the reorganization here in question caused the creation not only of a holding company but also of a new bank, so as to make it possible to say that there was a merger of one bank into another bank while glossing over the inapplicability of the bank merger legislation to triangular mergers.

The Maine court came to the nub of the problem when it stated:

> The Plan is a package containing a merger and an exchange for Bankshares. It does not meet the conditions of the merger statute. Federal may not under the statute compel its stockholders to convert their shares into shares of a company not a trust company resulting from the proposed merger. This, however, is precisely what is proposed in the Plan. In short, Marcou, who objects to the Plan, would be forced out of the resulting or surviving Federal. He is offered not shares in the merged bank, or Federal, but shares in Bankshares.

Again, when it was actually sought in *Dyer v. Eastern Trust & Banking Co.*, 336 F. Supp. 890 (D. Me. 1971), to apply Rule

133 to a similar bank reorganization under Maine law, the court, relying on *Marcou*, stated (at 900):

> The exemption for statutory mergers provided by Rule 133 * * * can reach only so far as to exempt the initial merger transaction. It does not reach beyond the merger to exempt the later distribution of unregistered stock, since it is clear that the exchange of stock was not pursuant to the Maine statutory provisions relating to mergers.

It follows that Rule 133 had no impact on the offer of the holding company stock to the shareholders of BTNB, and that, in the absence of an exemption, that offer violated § 5 of the 1933 Act.

Second: Even if the bank merger legislation were such as to have made Rule 133 applicable, that rule applied only to what would otherwise have been the "offer" or "sale" inherent in the shareholders' vote on the merger, not to any *reoffer* or *resale*. Resales of the surviving company's stock *by ordinary shareholders* would normally be exempted by §4(1), 15 U. S. C. §77d(1), as transactions "by any person other than an issuer, underwriter, or dealer." But Rule 133(c) provided that any constituent corporation in a merger (which is to say, any corporation other than the surviving issuer), as well as any person in a control relationship with any such person, would be an "underwriter" if he acquired securities of the surviving company with a view to their distribution. Thus Rule 133 could not have applied to the purported public auction of the stock of the holding company.

Moreover, the offering of the holding company shares "for investment only," as stated in the newspaper advertisement, did not serve to make available the further exemption in §4(2), 15 U. S. C. §77d(2), for "transactions by an issuer not involving any public offering." For an offering at public auction is by hypothesis an offer to the highest bidder, which is to say, an offer to the world. When an issuer does offer its stock to only a few sophisticated persons pursuant to the §4(2) exemption, it is implicit in the exemption that the initial buyers must take

for investment rather than redistribution; for otherwise they would simply be intermediaries in a public offering by the issuer. That presumably explans the "investment" reference in the newspaper advertisement. But it does not follow that an otherwise public offering becomes nonpublic merely because it is a condition of the offering that all buyers agree to take for investment. Consequently §5 was violated also in the offer of the holding company's stock at public auction.

Third: As a non-Alabama lawyer addressing an opinion to a lawyer in that state, I approach the Alabama Securities Act, 53 Code of Ala. 1940, with diffidence. On the other hand, apart from the fact that I have written on the blue sky laws generally (see 1 and 4 Loss, supra, c. 1B; 3 and 6 id., c. 11B; Lo ss& Cowett, *Blue Sky Law* (1958)), the Alabama Securities Act is basically the Uniform (State) Securities Act, 7 U. L. A. 691, which I drafted at the request of the National Conference of Commissioners on Uniform State Laws.

Section 5 of the federal statute has its analogue in §30 of the Alabama Act, which makes it unlawful for any person to offer or sell any security in the state unless it is registered or an exemption is available. The former Rule 133 of the SEC has its analogue in §38(n) of the state statute, which exempts "Any transaction incident to * * * a statutory * * * reclassification, recapitalization, reorganization, quasi reorganization, * * * merger, consolidation or sale of assets." And the private offering exemption in §4(2) of the federal statute has its analogue in §38(i), which exempts, in substance, an offer directed to not more than ten persons (apart from institutional investors) in the state during any period of twelve consecutive months.

It follows, for the reasons stated in the *Second* part of this opinion, that §30 of the Alabama statute was violated both (1) in the offer and sale of the holding company stock incident to the reorganization plan (there being no "statutory * * * merger" within the meaning of §38(n) so far as the holding company stock is concerned) and (2) in the subsequent offering of the holding company stock at auction (there being no ex-

emption available either under §38(i) or otherwise). Bank securities are exempted by §37(c) of the Alabama statute, as they are by §3(a)(2) of the federal statute, but bank holding company securities are not.

Fourth: So far as the proxy literature is concerned:

(1) Section 12(g)(1) of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U. S. C. §78*l*(g)(1), requires the registration with the SEC of every equity security held of record by at least 500 persons if its issuer is a company that is engaged in interstate commerce and has $1 million of gross assets. And §14(a) of that statute, 15 U. S. C. §78n(a), makes it unlawful for any person to solicit a proxy in violation of the Commission's rules, which require every solicitation of a proxy to be accompanied by a "proxy statement" that has been cleared by the Commission. Reg. 14, 17 C. F. R. §240.14a-1 *et seq*. Banks are not exempted from §12(g)(1) as they are from the registration requirement in the 1933 Act. But §12(i), 15 U. S. C. §78*l*(i), vests the SEC's administrative functions under §§12 and 14 in the appropriate bank regulatory authorities so far as bank securities are concerned – which means the Comptroller of the Currency with respect to national banks.

(2) When the SEC's proxy rules under §14(a) apply, material misstatements in soliciting proxies, whether in the "proxy statement" or otherwise, give rise to an implied right of action on the part of any person opposing the solicitation. *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964). By way of relief, a court of equity may do whatever is necessary to prevent the violator from enjoying the fruits of his violation, to the extent of undoing a consummated merger if a balancing of the equities so indicates. Id. at 433-35. Moreover, in an appropriate case there may be an award of damages. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 388-89 (1970). For this purpose the Supreme Court has recently held that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc. v. Northway, Inc.*, 96 S. Ct. 2126, 2133 (1976). All this is apart from whatever remedies a shareholder may have

qua "buyer" or "seller," under provisions other than the proxy rules, when his proxy is solicited in connection with a merger that involves a "sale" of the surviving company's securities. *SEC v. National Securities, Inc.*, 393 U. S. 453, 464-69 (1969).

(3) This learning applies equally to the proxy rules of the Comptroller, except that, as they read at the time of the reorganization [12 C. F. R. (revised as of Jan. 1, 1969) Part II], (a) they contained no general provision prohibiting false or misleading statements in proxy solicitations along the lines of the SEC's Rule 14a-9, 17 C. F. R. §240.14a-9, the rule involved in the first three Supreme Court cases just mentioned, and (b) the Comptroller in 12 C. F. R. §10.2 disavowed any intention "to confer any private right of action on any stockholder or other person against a national bank." But:

(a) Item 9 of the Comptroller's Schedule B, which had to be satisfied under §11.3 of his rules, had to "furnish in brief outline," if proxies were solicited in connection with "a merger * * * or similar matter," a statement of the "rights of appraisal or similar rights of dissenters," together with "any statutory procedure required to be followed by dissenting security holders in order to perfect such right." And the failure in this case to disclose to stockholders their statutory right under 12 U. S. C. §215a to receive stock of the surviving *bank* in a merger — as distinct from stock of a bank holding company — seems clearly to have been not only a failure to disclose a material fact as a matter of law within the meaning of the *TSC* case but also a failure to comply with Item 9 of the Comptroller's Schedule B and hence a violation of §14(a) of the 1934 Act. You have informed me that Mr. Henley would not have dissented if he had been able to obtain stock of the surviving bank rather than the holding company.

(b) So far as §10.2 of the Comptroller's rules is concerned, a failure to comply with his proxy rules is no less a violation of §14(a) of the statute than a failure to comply with the SEC's proxy rules that were before the Supreme Court in the cases cited. The conclusion seems compelling, therefore, that §10.2

as it read in 1969 was *ultra vires*. That is to say, once an administrator adopts rules under a statutory provision held by the Supreme Court to give rise to private rights of action, it is not for the administrator to attempt to delineate remedy as distinct from underlying substantive law. See 4 Loss, supra, at 2913; Shipman, *Two Current Questions Concerning Implied Rights of Action under the Exchange Act*, 17 W. Res. L. Rev. 925, 926-63, esp. at 959 (1966).

Moreover – and this is more important – I do not suggest that a violation of the Comptroller's proxy rules automatically creates a private right of action. Indeed, §27 of the 1934 Act, 15 U. S. C. §78aa, gives the federal courts inclusive jurisdiction of "all suits in equity and actions at law brought to enforce any liability or duty created by" that statute or the rules thereunder. What I do suggest is that, purely as a matter of the general equity powers that Alabama courts possess as a matter of *state* jurisprudence, (i) they should be no less eager to redress breaches of trust that are evidenced by violations of federal law, which under the Supremacy Clause is part of the total *corpus juris* of Alabama, than breaches of trust that are established in some other way, and (ii) the same considerations that impelled the Supreme Court of the United States in the cases cited as a matter of federal law should move the Alabama courts in exercising their general equity powers when they find a violation of the supreme law of the land. See Loss, *The SEC Proxy Rules and State Law*, 73 Harv. L. Rev. 1249, 1274-77 (1960), reprinted in 2 Loss, supra, at 996-99. I shall have more to say on this point in the *Sixth* part of this opinion.

(4) In any event, even apart from looking to illegal conduct under *statutory* law as a basis for a court's implying a right of action to redress fraudulent or false proxy solicitations, there is ample authority both in this country and in England for courts' simply exercising their general equity powers in order to render appropriate relief when shareholder resolutions have been passed as a result of what the British courts call "tricky circulars." *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358 (C. A.) (failure to disclose that some of the consideration for a

sale of assets was to go to the selling company's directors resulted in failure of the notice of meeting to "specify the purpose for which the meeting is called" as required by statute); *Tiessen v. Henderson,* [1899] 1 Ch. 861 (failure to disclose directors' stock options in a reorganization); *Baillie v. Oriental Telephone & Electric Co., Ltd.,* [1915] 1 Ch. 503 (C. A.) (suit to set aside ratification of directors' remuneration from subsidiary and to enjoin company and directors from acting thereon for failure to disclose very large amount of remuneration that had been received); *Mount v. Seagrave Corp.,* 112 F. Supp. 330, 334 (S. D. Ohio 1953), *aff'd on other grounds* sub nom. *Seagrave Corp. v. Mount,* 212 F. 2d 389 (6th Cir. 1954); *Pearson v. First Federal Savings & Loan Assn.,* 149 So. 2d 891, 895 (Fla. App. 1963); *Lonergan v. Crucible Steel Co. of America,* 37 Ill. 2d 599, 299 N. E. 2d 536 (1967).

Fifth: Section 17(a) of the 1933 Act, 15 U. S. C. §77q(a), makes it unlawful, in broad terms, for any person to engage in any fraudulent act or practice, to misstate a material fact, or to omit to state a material fact necessary to prevent the facts stated from being misleading, in connection with the sale of any security by use of the mails or any means of interstate commerce. And under §22(a) of that statute, 15 U. S. C. §77v(a), as distinct from the 1934 Act, the state courts are given concurrent jurisdiction. Because of the express rights of action given to defrauded buyers by §§11 and 12(2) of the 1933 Act, 15 U. S. C. §§77k, 77*l*(2), it is my own opinion that§17(a) does not itself create a private right of action by implication. See 3 Loss, supra, at 1784-87. And the federal courts are in dispute on the question. See 6 id. at 3913-14. However, as with respect to the federal proxy rules, proof of a violation of §17(a) ought to be relevant in establishing an actionable breach of trust as a matter of state law.

In any event, §28 of the Alabama Securities Act is substantially identical with §17(a) of the 1933 Act. And a comparison of §45(h) of the Alabama Securities Act with §410(h) of the Uniform Securities Act, from which it was borrowed, is noteworthy in this connection. For §45(h) of the Alabama statute

provides simply: "The rights and remedies provided by this title are in addition to any other rights or remedies that may exist at law or in equity." The Alabama legislature thus omitted the following additional language that was inserted in §410(h) of the Uniform Securities Act for the precise purpose of closing off the judicial implication of any private rights of action apart from those expressly created by the statute: "but this act does not create any cause of action not specified in this section or section 202(e) [which has to do with certain required surety bonds]." See Loss & Cowett, supra, at 395.

Sixth: I express no opinion with respect to any statute of limitations, or any estoppel arguments that may be available to the counter-complainant in that connection, except to observe that §13 of the Securities Act of 1933, 15 U. S. C. §78m, provides that no action may be brought "to enforce a liability created under" §12(1) for violation of §5 unless brought within one year after the violation on which it is based and in any event within three years after the security was "bona fide offer to the public." However, even if it be assumed that the statute has run on an action for rescission or damages under §12(1) as such, it is worth noting once more that the violations of the registration requirements of §5 of the 1933 Act, like the violations of the antifraud provisions of §17(a) of that statute and the provisions of the Alabama Securities Act that are comparable to both sections, go to establish the counter-complainant's allegation that the reorganization plan involved a breach of BTNB's fiduciary duties in general and, more specifically, a "squeeze-out" of the Trust.

By way of analogy, it is generally held under the blue sky laws that expiration of the statute of limitations for a buyer's action based on a violation of the statute does not bar his asserting the violation defensively. *Mechanics Loan & Savings Co. v. Mathers,* 185 Ga. 501, 195 S. E. 429 (1938); *Zehring v. Foster,* 184 Kan. 599, 339 P. 2d 331 (1959); *Key Broadcasting System, Inc. v. Griffith,* 119 N. Y. S. 2d 174, 175-76 (Sup. Ct. 1953) (1933 Act).

Seventh: So far as the "squeeze-out" factor is concerned, what the Maine court said in *Marcou*, 268 A. 2d at 635, is equaliy pertinent here: "An important purpose of the plan for the proposed merger obviously is to obtain for [the holding company] 100% of the [bank's] stock by the elimination of the unwilling [bank] stockholders by the device of payment for their shares under the dissenting stockholder's statute." This in itself has been held sufficient to justify investigatory and injunctive action under the antifraud provisions of blue sky laws comparable to §28 of the Alabama Securities Act. *Berkowitz v. Power/Mate Corp.*, 342 A. 2d 566 (N. J. Super. 1975); *People v. Concord Fabrics, Inc.*, 371 N. Y. S. 2d 550 (Sup. Ct. 1975), *aff'd mem.*, 377 N. Y. S. 2d 84 (1st Dept. 1975).

Eighth: I note, in conclusion, that the Amended and Supplemental Counter Complaint might be read as demanding greater relief than is contemp'ated by the instructions of the Alabama Supreme Court in 322 So. 2d at 969-97. On the other hand, it appears to me that the salient part of those instructions is ¶1, where the Circuit Court was ordered to appoint a temporary trustee for "the retrial of this cause." It seems to be altogether within the spirit of that paragraph, and of the court's instructions generally, for the temporary trustee to err, if at all, on the side of acting more rather than less rigorously to protect the Trust estate.

Very truly yours,

Louis Loss

APPENDIX C(1)

PERTINENT PROVISIONS OF THE FEDERAL SECURITIES LAWS AND REGULATIONS OF THE SECURITIES AND EXCHANGE COMMISSION PROMULGATED THEREUNDER

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation

or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

May 27, 1933, c. 38, Title I, § 5, 48 Stat. 77; June 6, 1934, c. 404, § 204, 48 Stat. 906; Aug. 10, 1954, c. 667, Title I, § 7, 68 Stat. 684.

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

Any person who —

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income

received thereon, upon the tender of such security, or for damages if he no longer owns the security.

May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686.

§ 77n. Contrary stipulations void

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

May 27, 1933, c. 38, Title I, § 14, 48 Stat. 84.

§ 77*o*. Liability of controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

May 27, 1933, c. 38, Title I, § 15, 48 Stat. 84; June 6, 1934, c. 404, § 208, 48 Stat. 908.

§ 77p. Additional remedies

The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

May 27, 1933, c. 38, Title I, § 16, 48 Stat. 84.

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of

transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 10, 68 Stat. 686.

§ 77v. Jurisdiction of offenses and suits

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is

an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

May 27, 1933, c. 38, Title I, § 22, 48 Stat. 86; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 10, 1954, c. 667, Title I, § 11, 68 Stat. 686; Oct. 15, 1970, Pub.L. 91-452, Title II, § 213, 84 Stat. 929.

§ 77x. Penalties

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon

conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

May 27, 1933, c. 38, Title I, § 24, 48 Stat. 87.

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, § 10, 48 Stat. 891.

§ 78n. Proxies

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact

necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

June 6, 1934, c. 404, § 14, 48 Stat. 895; Aug. 20, 1964, Pub.L. 88-467, § 5, 78 Stat. 569, 570; July 29, 1968, Pub.L. 90-439, § 3, 82 Stat. 455; Dec. 22, 1970, Pub.L. 91-567, §§ 3-5, 84 Stat. 1497.

§ 78cc. Validity of contracts

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: *Provided*, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of

subsection (c) of section 78*o* of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78*o* of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

Rule 10b-5, 17 CFR § 240.10b-5, provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To encourage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

SECURITIES AND EXCHANGE COMMISSION — Rule 14a-9. False or Misleading Statements

(*a*) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy

for the same meeting or subject matter which has become false or misleading.

(*b*) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

APPENDIX D(1)

THE STAGE OF THE PROCEEDINGS IN THE TRIAL COURT, AT WHICH, AND THE MANNER IN WHICH, THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The first five paragraphs of Petitioner's Counter Complaint set forth the following:

1. The LINN-HENLEY CHARITABLE TRUST, of which the "Old Bank" was co-trustee, held 27,460 shares of common capital stock of the "Old Bank". The complaint charges that the Merger and Plan of Reorganization was so designed by the counter-defendants as to fraudulently and unlawfully freeze out the "Trust" as a minority stockholder, in violation of the state and *federal securities laws,* the *Federal Banking laws,* as well as in breach of the common law fiduciary duties of the counter-defendants.

2. The counter-complaint does not seek to set aside or unscramble the merger, per se, between the "Old Bank" and the "New Bank", allegedly accomplished pursuant to the banking laws of the United States, invalid as such merger may be.[1] It may now be impracticable to unscramble "an $80,000,000 egg".[1a] The gravamen of the counter-complaint is not the merger between the two banks, but the fraud, misrepresentations and omissions of fact, unlawful conduct, unfair dealing, and oppression of the "Trust" as a minority stockholder, which was unlawfully and deceitfully tricked into parting with its stock in the "Old Bank", and, in addition, was denied the very benefits to which it was entitled *under the Federal Banking laws.*[2]

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[1]*Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 24 L.Ed. 593, 90 S.Ct. 616. *SEC v. National Securities,* 393 U.S. 453, 212 L.Ed.2d 668.

[1a]*May v. Midwest Refining Company,* 25 F.Sup. 560 Aff'd., 121 F.2d 431, Cert. Denied, 86 L.Ed. 534.

[2]*SEC v. National Securities,* 393 U.S. 453, 21 L.Ed.2d 668, 89 S.Ct. 564. *May v. Midwest Refining Co.,* Supra.

(a) The counter-complaint alleges that the "New Bank" constituted no more than the "Old Bank" in a new shell, the "New Bank" being "in fact the same business, at the same stand, with the same folks, since 1897".[3] The transaction by which the stock of the "Holding Company" was exchanged for the stock of the "Old Bank" was in fact, and in law, a tender offer to the stockholders of the "Old Bank" on the part of the "Holding Company", which was not obligatory upon minority stockholders, *and which required registration and full disclosure, pursuant to a prospectus under the state and federal securities laws.* However, the counter-defendants fraudulently and unlawfully, by misrepresentations and omissions of material facts, disguised the transaction as a so-called statutory "merger", which presumably was binding upon all stockholders, except those desiring to dissent, *and which presumably was also exempt from the registration requirements of the state and federal securities laws,* all for the purpose of oppressing and freezing out by unlawful means the minority stockholders, including the "Trust".[4]

* * *

3. Counter-complaint further seeks damages for the breach by the counter-defendants as Trustees, of their fiduciary duties to the "Trust" *in the appraisal process following the merger of the two banks on the ground of self dealing on their part, and on the further ground that they so structured the alleged Merger and Plan of Reorganization as to make it impossible for the "Trust" to receive the full benefits to which it was entitled under the merger provisions of the federal banking laws for the following reasons*:

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[3]*Birmingham Trust National Bank v. State,* 294 So.2d 153; 292 Ala. 335.

[4]*SEC v. Dolnick,* 501 F.2d 1279 (7th Cir. 1974); Title 58 §§ 28, 45, Code of Ala. 1940, as supplemental; *Dyer v. Eastern Trust & Banking Company,* 336 F.S. 890 (1971).

(a) Under the Plan of Reorganization, all of the stock of the "New Bank" was, upon the effective date of the merger, transferred to the "Holding Company", and there was no stock of the consolidated or continuing bank which could be sold at public auction, as required by the federal banking laws, to protect the rights of the dissenting "Trust".[5]

(b) The stock of the "Holding Company" was not the stock of the "receiving association" bank, required by the banking laws to be sold at public auction. *Additionally, this stock was sold by the counter-defendants to themselves at public auction at $26 per share under the advertised caveat that it is not registered under the Securities Act of 1933, and that any purchaser must purchase under an investment letter.* This constituted, first, an unlawful and inexcusable *self dealing*, having purchased such stock at a price below its fair value and even below the appraised value thereof by the Comptroller of the Currency. Secondly, such sale violated the fiduciary duty on the part of the counter-defendants to the "Trust" *in failing to register such stock so as to enable such stock to be freely sold at public auction*, unhampered by the burden resulting from non-registration. *Accordingly, the counter-defendants subverted and made a mockery of the appraisal process provided under the federal banking laws, and are due to compensate the "Trust" for the loss of the benefits to which it was entitled as a dissenting stockholder.*

(c) The subsequent attempted sale of the stock of the "New Bank" held by the "Holding Company" was a mere sham, and a charade, for the reason that such stock was, under the specific terms of the Merger Agreement, to be held by the "Holding Company" for the sole purpose of enabling it to exchange its stock for the stock of the "Old Bank". Thus, neither the stock of the "receiving association", which would have been delivered to the "Trust"

[5]Title 12, § 215a (d) USCA.

had it not dissented, as required by the federal statute, nor the unregistered stock of the "Holding Company", which would have been delivered to the "Trust" under the Merger Agreement, though contrary to the federal statute, was in fact sold at public auction, as contemplated by the federal law.

(d) The sale of stock of the Consolidated Bank at public auction, contemplated under the Federal Banking Act, is designed to provide a dissenting stockholder the opportunity to receive the excess of any sale at public auction above the appraised value made by the Comptroller of the Currency. Such opportunity was denied by the counter-defendants to the "Trust". Assuming the attempted sale of the "Holding Company" stock was designed to serve as a substitute for the stock of the Consolidated Bank, the sale of such stock to the affiliate of the "New Bank" was, in addition to all other grounds, invalid as a breach of fiduciary duty.[6]

(e) Accordingly, the counter-defendants have, by self dealing, converted to themselves the benefits to which the "Trust" was entitled under the appraisal process set out in the banking laws. In these circumstances, the counter-defendants may not be permitted to profit from their own wrong, and are liable to the "Trust".[7]

4. The counter-complainant, on jurisdictional grounds, does not question the validity of the merger between the "Old Bank" and the "New Bank", per se. The counter-complainant does charge, however, that the Reorganization Plan and Merger and Reorganization Agreement adopted by the counter-defendants is a package containing a two-step plan of reorganization.

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[6]*Stanley v. Fidelity Union Trust Co.*, 108 N.J. Equity 564, 138 A. 388; *Rothenberg v. Franklin Washington Trust Company*, 127 N.J. Equity 406, 13 A.2d 667; *Allbright v. Jefferson County National Bank*, 229 N.Y. 31, 53 N.E.2d 753, Anno. 151 ALR 905.

[7]Title 12, §§ 24-83, USCA.

The first step consists in the merger of the two banks, as authorized by Title 12, § 215a of the Federal Banking Act.[8]

The second step, and the one here in question, is the exchange of the stock by the "Holding Company" for the stock of the "Old Bank". This exchange was unlawful since it violated the provisions of §§ 12(1), 12(2) and 17(a) of the Federal Securities Act of 1933, and §§ 28, 30 and 45 of Title 53, Code of Ala. 1940, as supplemented, in that the "Holding Company" stock was not registered either with the Federal Securities & Exchange Commission or with the State Securities Commission.

(a) The exemptions for statutory mergers provided by Rule 133 of the Securities & Exchange Commission and by Title 53, § 38n, Code of Ala. 1940, do not apply to the distribution of unregistered stock by the "Holding Company".[9]

(b) The counter-defendants erroneously relied upon the provisions of Rule 133 of the Securities & Exchange Commission as allegedly providing an exemption from the Registration provisions of the Securities Act of 1933, insofar as the distribution of the "Holding Company" stock is concerned. Even if the reliance were justified, which counter-complainant expressly denies, and assuming that the "New Bank" were to have exchanged the stock of the "Old Bank" for the stock of the "Holding Company", as the Plan of Reorganization required, and which Title 12, § 24 USCA forbade, it could not have sold such stock at public auction on February 10, 1970, since the stock was unregistered and since an affiliate of the "Holding Company" cannot rely on the exemptions from registration

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[8]Title 12, § 215a does not permit the merger of a national bank with a non-banking association.

[9]*Marcou v. Federal Trust Co.*, 268 A.2d 629 (Me. 1970); *Dyer v. Eastern Trust & Banking Co.*, 336 F.S. 890 (1971); *SEC v. Dolnick*, 501 F.2d 1279.

provided by Rule 133 of the Securities & Exchange Commission.[10]

(c) The issuance by the "New Bank" of 1,000,000 shares of its stock to the "Holding Company" to enable it to exchange 1,000,000 shares of its stock for a like number of shares of stock of the "Old Bank", made the "New Bank" an underwriter of the stock of the "Holding Company", within the meaning of Title 15, § 77b (11) of the Securities Act of 1933. This put the "New Bank" in the dilemma where its participation with the "Holding Company" in the distribution of its stock violated the provisions of Title 15, § 77e USCA, which prohibited the sale of unregistered stock, and of Title 12, § 24, USCA of the Banking Act, which prohibits a national bank from underwriting "any issue of securities or stock," whether registered or not.

(d) Accordingly, the remedy sought by the counter-complainant for the "Trust" against the counter-defendants, as trustees, under this claim is not based upon the appraisal process, but is based rather upon the fraud, whether intentional or not, unlawful conduct, oppression and unfair treatment of the "Trust", as a minority stockholder, in disguising the stock exchange between the "Holding Company" and the stockholders of the "Old Bank" as being part of a statutory merger, and thus forcing the "Trust" to resort to an impossible appraisal process, the statutory remedy of appraisal being now impossible or impractical to apply, and not being exclusive, in any event.[11]

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[10]*See* former Rule 133 of the Securities & Exchange Commission; *Dyer v. Eastern Trust & Banking Co.*, 336 F.S. 890 (1971); *SEC v. Dolnick*, 501 F.2d 1279.

[11]*May v. Midwest Refining Co.*, 25 F.Supp. 560, Aff'd., 121 F.2d 431, Cert. Den., 62 S.Ct. 129, 314 U.S. 668, 86 L.Ed. 534; *Thruston v. National & American Trust Co.*, 32 F.Supp. 929; *Mills v. Electric Auto-Lite Co.*, 24 L.Ed. 593, 396 U.S. 375; *Lebold v. Inland Steel Co.*, 125 F.2d 369; *Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326; *SEC v. National Securities, Inc.*, 21 L.Ed. 668, 313 U.S. 453, 89 S. Ct. 564; *Cold v. Wells*, 224 Mass. 504, 113 N.E. 189.

(e) The damages flowing from such fraud, oppression, unlawful conduct and unfair treatment of the "Trust" in causing it to part with its stock as a result thereof, is not limited to an appraisal thereof at the time of the alleged merger or at the time of the abortive sale thereof at public auction. On the contrary, counter-complainant is entitled to, and does hereby claim, damages incident to the right of rescission, conversion and restitution, that is, the highest value of such stock at the time of trial, together with all profits made by counter-defendants from the time the same was acquired by the "Holding Company", and costs, including attorney's fees.[12]

The Fraudulent Proxy Statement

5. In addition, the counter-claimant charges that, irrespective of the validity of the merger between the two banks, the proxy statements circulated by the counter-defendants to the stockholders of the "Old Bank", including the "Trust", contained certain untrue or misleading statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading, and constituted an engagement in an act, practice or course of business which operated or would operate as a fraud or deceit upon the "Trust", in violation of Title 53, § 28, Code of Ala. 1940, as supplemented, and Title 15 77q(a) or the Securities Act of 1933, and the fiduciary duties on the part of the counter-defendants to the "Trust".[13]

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[12]*Ribakove v. Rich,* 173 NYS2d 306; *Robb v. Eastgate Hotel, Inc.,* 347 Ill. App. 261, 106 N.E.2d 848; *Fletcher* Vol. 13 § 5906.3.

[13]*Supt. of Insurance v. Bankers Life § C. Co.,* 404 U.S. 6, 30 L.Ed.2d 128; *Securities § Exchange Commission v. National Securities,* Supra; *J. I. Case Co. v. Borak,* 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555; *Miller v. American Telephone § Telegraph Co.,* 507 So.2d 759 (1974); *Cort v. Ash,* 45 L.Ed.2d 26, 422 U.S. 66, 95 S.Ct. 2080; Title 53, § 28, et seq., Code of Ala. 1940, as supplemented; *Henley v. Birmingham Trust National Bank,* 322 So.2d 688; *First National Bank v. Bosham,* 191 So. 873, 238 Ala. 300; Title 58, § 44, Code of Ala. 1940, as supplemented; Anno. 170 ALR 358; 90 CJS, § 247c(2).

(a) These omissions, particularly the omission to disclose that the exchange of the stock of the "Holding Company" for the stock of the "Old Bank" was not part of the merger authorized by the banking laws, and that the stock of the "Holding Company" was unregistered and was not exempt from registration, were material, as a matter of law, for the reason that not only is there a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote, but that the established omissions as shown by the record, and as hereinafter more fully set out, are so obviously important to an investor holding stock in the "Old Bank" that reasonable minds cannot differ on the question of materiality.[14]

That The Comptroller Cannot Approve Violations Of Law

The seventh paragraph of the Counter-Complaint states:

"7. As previously stated, the counter-complainant does not seek in this cause to review or revise the decision of the Comptroller of the Currency of the United States approving the merger of the two banks. The fact, however, that the Comptroller of the Currency approved the merger in question is immaterial, since he does not have the power or jurisdiction to approve the second step in the reorganization plan, which violates both the banking laws as well as the state and federal securities laws. In short, the Comptroller of the Currency may not violate the law, state or federal.[15]

(a) Assuming this Court may not have jurisdiction to review the acts of the Comptroller of the Currency, it does not follow that it is incumbent upon this court to approve

[14]*TSC Industries, Inc. v. Northway, Inc.*, 48 L.Ed.2d 757.

[15]Title 12, §§ 1846, 215a (f), 92a (a), 24; *Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692; *New Hampshire Bankers Association v. Nelson*, 460 F.2d 307; *Braeburn Securities Corporation v. Smith*, 153 N.E.2d 806, 15 Ill.2d 35, appeal dismissed, 79 S.Ct. 876, 359 U.S. 311, 3 L.Ed.2d 831; *Whitney National Bank in Jefferson Parish v. James*, 189 So.2d 430 (La.).

them, or to ratify and confirm the illegal transactions engaged in by counter-defendants as prayed for in the counter-defendant bank's petition filed in this cause, whereby it seeks, among others, a determination that the auction sales of the shares of stock of counter-defendants, described in Paragraph 17 of the petition, fully complied with the requirements of 12 USC 215a(d), and a confirmation by this court of such sales in all respects. This is especially true where such transactions not only do not comply with the federal banking laws, but violate the state and federal securities laws, as well as the fiduciary duties of the counter-defendants to the "Trust".[16]

The trial court in its decree fully adopted the theories of liability advanced by the Temporary Trustee (Appendix pp. A-10, 11), and its judgement, whatever may be its reasoning, is clearly supportable under Federal law.

[16]"Local Law" as used in § 92a, Title 12 USCA, is defined as "the law of the state . . . governing the fiduciary relationship," 12 C.F.R., § 9.1 (f) (1974); *American Trust Co., Inc. v. South Carolina State Board of Banking Control,* 381 F.Supp. 313.

APPENDIX D(2)

THE STAGE IN THE PROCEEDINGS IN THE APPELLATE COURT, AT WHICH, AND THE MANNER IN WHICH, FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The decree of the trial court was handed down after a trial lasting some six weeks. BTNB appealed to the Supreme Court of Alabama. In the brief filed on behalf of the Petitioner, as Appellee, the federal questions in support of the judgment of the court below were raised as follows:

1. By Presenting In Appellee's Brief The Following Claims And Theories Of Liability Under The Federal Statutes And Regulations:

"(a) *Nature of the Supplemental and Amended Counter-Complaint of the Temporary Trustee*

The Counter-Complaint, as last amended, does not seek to set aside or unscramble the merger per se, between the "Old" Bank and the "New" Bank, or the Plan of Reorganization whereby the "New" Bank became the wholly-owned subsidiary of the "Holding Company," nor does it seek to have the court review the appraisal of the Comptroller of the Currency. This court has foreclosed there issues in HENLEY.

As stated on page 2 of the Counter-Complaint:

> The gravamen of the Counter-Complaint is not the merger of the two banks, but the fraud, misrepresentations and omissions of facts, unlawful conduct; unfair dealing and oppression of the Trust as a minority stockholder, which was unlawfully and deceitfully tricked into parting with its stock in the 'Old' Bank and, in addition, was denied the very benefits to which it was entitled under the Federal Banking laws.

While the Counter-complaint is lengthly and sets forth numerous breaches of fiduciary duty, supported by highest authority, it may be distilled into three basic claims based upon several theories of liability which support the judgments appealed from:

CLAIM TWO

Breach of Fiduciary Duties by BTNB and the "Holding Company" Arising Out of the Abortive Public Auctions' of the "New" Bank and the "Holding Company" Stocks — the Abuse of the Second Phase of the Appraisal Process.

This claim, amounting to the sum of $1,200,000, represents the difference between the amount bid by the "Holding Company" for the 27,460 shares of the "Holding Company" stock at the public auction held on February 10, 1970, and the value thereof at the date of trial. It alleges that BTNB breached its fiduciary duties, in collaboration with the "Holding Company," in connection with the abortive public auctions of the "New" Bank and the "Holdng Company" stocks, pursuant to the attempted but utterly futile compliance with the provisions of Title 12, § 215a(d), which is in part referred to by this court in the instructions to the court below in Syllabus [14]2(b).

Based upon newly-developed evidence and theories of liability, the Temporary Trustee here seeks to recover from BTNB and the "Holding Company" damages to the Trust flowing not only from the failure by BTNB to actively solicit bidders at the sham public auction of the "New" Bank stock, referred to by this court in Syllabus [14]2(b), *but flowing also from the fraud, violation of the securities laws and self dealing engaged in by both Appellants.* The full scope of the lack of good faith, duplicity, and violations of the laws by BTNB were not fully presented for consideration either to the court below on the first trial of this cause or to this court on the first appeal. *These acts of bad faith and breaches of trust, according to the allegations of the Counter-complaint, coalesced so as to render it legally impossible for BTNB to hold a meaningful or realistic*

public auction of the stock of either the "New" Bank or of the "Holding Company", as envisioned by the Federal Banking Act.

Accordingly, this claim joins and is based upon the totality of the following breaches of fiduciary duty on the part of the "New" Bank:

(1) In failing to actively seek potential bidders as of the time of the alleged public auction of the "New" Bank stock on March 6, 1970, as instructed by this court under [14]2(b) and (c); which was then wholly owned by the "Holding Company," and was no longer traded or tradeable on the market;

(2) *In so structuring the Plan of Reorganization, as to fail to provide for the public auction of the "New" bank stock, contrary to the provisions of the Banking Act;*

(3) In so structuring the Plan of Reorganization that *all* of the stock of the "New" Bank was, upon the effective date of the merger, owned by the "Holding Company", *thus legally disabling the "New" Bank from selling the 27,460 shares of the "New" bank stock, as required by the Banking Act, and, in addition, rendering the same no longer tradeable on the market and no longer subject to a meaningful sale at public auction;*

(4) In unlawfully, and contrary to the Federal and State Securities and other anti-fraud statutes, offering to sell at public auction on February 10, 1970 the 27,460 shares of the unregistered stock of the "Holding Company;"

(5) In unlawfully distributing to the Trust, among others, a false and misleading proxy statement in connection with the sale or offer to sell the "New" bank and the "Holding Company" stocks; and

(6) In engaging in self dealing by selling the "Holding Company" stock at the greatly depressed price prevailing some 14 months after the effective date of the merger, in direct competition with and in subordination of the interests of the Trust. (Count ONE Under Item IV of the Counter-Complaint headed

"Breach of Fiduciary Duties Claims," R. 373-395, and Count VI, R. 398)."

2. By Submitting To The Appellate Court The Following Issues Of Law, And Authorities In Support Thereof.

"APPELLEE'S ISSUE NO. XXII

BTNB WAS NOT PROHIBITED BY THE REGULATION OF THE COMPTROLLER FROM INVESTING THE FUNDS OF THE TRUST IN THE STOCK OF ITS AFFILIATE. SUCH PURCHASE WAS PERMISSIBLE AS BEING WITHIN THE EXCEPTIONS OF THE REGULATION OF THE COMPTROLLER OF THE CURRENCY, WHICH PERMIT SUCH INVESTMENT "WHERE LAWFULLY AUTHORIZED BY THE INSTRUMENT CREATING THE RELATIONSHIP, OR BY COURT ORDER OR BY LOCAL LAW."

12 C.F.R. § 9.12

APPELLEE'S ISSUE NO. XXIII

THE RULE WHICH PROHIBITS SELF DEALING IS EQUALLY AS APPLICABLE TO THE SALE OF THE "HOLDING COMPANY" STOCK TO THE "HOLDING COMPANY" AS IT IS TO THE PURCHASE BY THE TRUST OF THE STOCK OF THE "HOLDING COMPANY." IN FACE OF SUCH IRRECONCILABLE CONFLICT OF INTERESTS IT WAS INCUMBENT UPON BTNB AS CORPORATE CO-TRUSTEE TO APPLY TO A COURT FOR INSTRUCTIONS, BEFORE THE PUBLIC AUCTION OR, AT LEAST, PROMPTLY THEREAFTER.

Scott on Trusts, 3rd Ed. § 170.7, 170.4

Ann. Power to Testimentary Trustee to Purchase at Its Own Sale, 1 A.L.R. 746

Ann. Trustees, etc. Purchase from or Sale to Corporation of which he is an Officer of Stockholder, 105 A.L.R. 449
76 Am.Jur.2d § 319, 464
Strates v. Dimotsis, supra
First National Bank v. Basham, supra
Ann. 20 A.L.R.34d, § 11, p. 852, *supra*
First National Bank of Colorado Springs v. McGuire, 184 F.2d 620

APPELLEE'S ISSUE NO. XXVII

A TRUSTEE CANNOT BE ALLOWED A PROFIT FROM THE PURCHASE OF PROPERTY THROUGH A BREACH OF TRUST AND IS ACCOUNTABLE TO THE BENEFICIARIES FOR SUCH PROFIT, EVEN THOUGH THE PROFIT IS NOT MADE AT THE EXPENSE OF THE TRUST ESTATE.

Scott on Trusts, 3rd Ed., § 205

APPELLEE'S ISSUE NO. XXVIII

A TRUSTEE IS ACCOUNTABLE FOR PROFITS EVEN THOUGH SUCH PROFITS ARE NOT MADE THROUGH A BREACH OF TRUST IF IT WAS MADE IN THE ADMINISTRATION OF THE TRUST, OR IS SO CONNECTED WITH THE SCOPE OF HIS DUTIES AS FIDUCIARY SO THAT IT IS IMPROPER FOR HIM TO PURCHASE THE PROPERTY FOR HIMSELF.

Scott on Trusts, 3rd Ed., §§ 203 and 504

APPELLEE'S ISSUE NO. XXV

WHERE A TRUSTEE SELLS TRUST PROPERTY TO HIMSELF AT PUBLIC AUCTION, THE SALE CAN BE SET ASIDE BY THE BENEFICIARY EVEN THOUGH THE SALE WAS AT A FAIR PRICE; AND THE ONLY WAY FOR A TRUSTEE TO PURCHASE SAFELY, IS BY

FILING A BILL IN COURT SEEKING PERMISSION TO BID AT THE PUBLIC AUCTION.

Scott on Trusts, § 170.1, 170.4, 170.7

APPELLEE'S ISSUE NO. XXVI

WHERE A SALE IS MADE WITHOUT AUTHORIZATION OF A COURT, THE COURT WILL NOT LATER APPROVE IT IF AT THE TIME ITS APPROVAL IS ASKED THE PROPERTY HAS SO INCREASED IN VALUE THAT AT THAT TIME THE SALE DOES NOT APPEAR TO BE ADVANTAGEOUS TO THE TRUST ESTATE.

Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738
Morse v. Hill, 136 Mass. 60
Scott on Trusts, § 170.7, p. 1318

APPELLEE'S ISSUE NO. XXIX

A FIDUCIARY WHO IMPROPERLY COMPETES WITH A BENEFICIARY AND THEREBY ACQUIRES PROPERTY HOLDS THE SAME UPON A CONSTRUCTIVE TRUST FOR THE BENEFICIARY.

Scott on Trusts, § 504, 203 and 205
Liken, et al. v. Shaffer, et al., 141 F.2d 877 (8th Cir. 1944)

APPELLEE'S ISSUE NO. XXX

IF A BREACH OF TRUST RESULTS IN THE FAILURE TO MAKE A GAIN WHICH WOULD OTHERWISE HAVE ACCRUED TO THE TRUST ESTATE, THE TRUSTEE IS CHARGED WITH THE AMOUNT OF THE GAIN WHICH WOULD HAVE ACCRUED.

Scott on Trusts, § 205

APPELLEE'S ISSUE NO. XXXI

BTNB, AS CO-TRUSTEE, COMMITTED A BREACH OF FIDUCIAKY DUTY IN CONNECTION WITH THE

SECOND PHASE OF THE APPRAISAL PROCESS RELATING TO THE PUBLIC AUCTION OF THE STOCK OF THE "RECEIVING ASSOCIATION" IN FAILING TO COMPLY WITH THE FEDERAL BANKING ACT: AND IN SO STRUCTURING THE PLAN OF REORGANIZATION AS TO FAIL TO PROVIDE FOR OR MAKE POSSIBLE THE AUCTION OF THE STOCK OF THE "RECEIVING ASSOCIATION," THUS DISABLING BTNB FROM HOLDING A LEGAL AND MEANINGFUL PUBLIC AUCTION OF THIS STOCK, IN ADDITION TO OTHER BREACHES OF DUTY, INCLUDING FAILING TO ACTIVELY SOLICIT POTENTIAL BIDDERS FOR THIS STOCK.

Title 12, § 215a(d) USCA
Professor Louis Loss (R. p. 1229)

APPELLEE'S ISSUE NO. XXXII

BTNB BREACHED ITS FIDUCIARY DUTY TO THE TRUST IN SO DISGUISING THE PLAN OF REORGANIZATION AS TO MAKE IT APPEAR THAT IT WAS INCUMBENT UPON THE TRUST, AS A MINORITY STOCKHOLDER, TO EXCHANGE ITS STOCK IN THE "OLD" BANK FOR THE STOCK OF THE "HOLDING COMPANY," SO AS TO "FREEZE OUT" THE TRUST AS A MINORITY STOCKHOLDER; WHEREAS IN TRUTH, THE EXCHANGE OF THE STOCK OF THE "HOLDING COMPANY" FOR THE STOCK OF THE "OLD" BANK CONSTITUTED A MERE TENDER OFFER OF UNREGISTERED STOCK, CONTRARY TO THE STATE AND FEDERAL SECURITIES REGISTRATION REQUIREMENTS.

Dyer v. Eastern Trust & Banking Co., 336 F.Supp. 890
Marcou v. Federal Trust Company, 268 A.2d 635
SEC v. Dolnick, 501 F.2d 1279
Bryan v. Brock & Blevins Co., 343 F.Supp. 1062, aff'd., 490 F.2d 563

Professor Louis Loss (R. p. 1229)

APPELLEE'S ISSUE NO. XXXIII

BTNB BREACHED ITS FIDUCIARY DUTY TO THE TRUST BY CIRCULATING A FALSE OR MISLEADING PROXY STATEMENT, CONTRARY TO THE ALABAMA SECURITIES LAWS AND OTHER ANTI-FRAUD STATUTES.

SEC v. National Securities, supra

Belcher v. Birmingham Trust National Bank, 348 F.Supp. at p. 146

Santa Fe Industries v. Green, 51 L.Ed. 480

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 24 L.Ed.2d 593, 90 S.Ct. 616

Swanson v. American Consumer Ind. Inc., 415 F.2d 1326

Title 15-21-10, Code of Alabama 1975

Title 15-21-21, Code of Alabama 1975

Title 6-5-101, Code of Alabama 1975

Title 6-5-102, Code of Alabama 1975

APPELLEE'S ISSUE NO. XXXV

THE DAMAGES FLOWING TO THE TRUST FROM THE IMPROPERLY HELD AUCTION OF THE UNREGISTERED "HOLDING COMPANY" STOCK, AND THE ILL-GOTTEN GAINS RETAINED BY THE APPELLANTS AS A RESULT OF THE PROSCRIBED SELF DEALING IN CONNECTION THEREWITH, ALL ACCOMPANIED BY VIOLATION OF STATE AND FEDERAL ANTI-FRAUD STATUTES, ARE DUE TO BE RECOVERED BY THE TRUST AND ARE WITHIN THE REACH OF THE LETTER AND SPIRIT OF THE INSTRUCTIONS OF THIS COURT IN HENLEY IN SYLLABUS [14]2(b) and (c).

Scott on Trusts, 3rd Ed. § 203, 205, 462, 504

Ann. 105 A.L.R. 409

Tac Amusement Co. v. Mitchell, 330 F.2d 27 (1971)

Garner v. Boyd, 330 F.Supp. 22, aff'd. 447 F.2d 1373

Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1

Likin v. Shaffer, 141 F.2d 877 (8th Cir. 1944)

Nelson v. Shaffer, 323 U.S. 756

Belcher v. Birmingham Trust Co., supra

APPELLEE'S ISSUE NO. XXIV

IT WAS NOT INCUMBENT UPON THE COURT BELOW TO RATIFY THE SELF DEALING ON THE PART OF BTNB IN REFUSING TO CONCUR IN THE REQUEST OF THE INDIVIDUAL CO-TRUSTEE TO BID AT THE PUBLIC AUCTION OF THE "HOLDING COMPANY" STOCK AND IN SELLING THE SAME TO ITS PARENT, THE "HOLDING COMPANY." THIS IS SO FOR THE REASON THAT (a) BTNB FILED A PETITION FOR INSTRUCTIONS AND FOR RATIFICATION OF ITS ACTS IN OCTOBER 1971, AT WHICH TIME THE BROAD PROVISIONS OF TITLE 19-3-10, CODE OF ALABAMA 1975, AUTHORIZING SUCH SALE WERE MADE APPLICABLE TO THE SALE IN QUESTION; AND FOR THE FURTHER REASON THAT (b) BTNB FAILED TO SEEK SUCH INSTRUCTIONS OF THE COURT, AS REQUIRED BY LAW, EITHER BEFORE OR PROMPTLY AFTER THE PUBLIC AUCTION.

Scott on Trusts, 3rd Ed. § 170.4, 170.7

First National Bank of Birmingham v. Basham, supra

Ann. 1 A.L.R. 747

76 Am.Jur. Trusts § 464

The Way The Federal Questions Were Passed Upon By The Appellate Court

The Supreme Court of Alabama completely ignored or refused to apply the federal laws and regulations advanced by the Petitioner.

It ignored and refused to apply the federal laws and regulations which govern the rights of the Trust in this cause, and which prohibit the sale by BTNB to, and the purchase by, the "Holding Company" of its unregistered stock at the public auction in question.

It is the wrongful, unlawful and illegal sale of the stock to the "Holding Company, contrary to federal law, which constitutes the gravamen of the counter-complaint, and not the failure to sell the same to the Trust, pursuant to state laws.

The laws which prohibit self-dealing by trustees have been adopted by the Comptroller of the Currency in Regulations 12 C.F.R. 9.12, promulgated pursuant to a federal statute. These regulations supplement state law and are binding upon national banks. Accordingly, an act of self dealing by a national bank cannot be upheld by a state court under state law, if it violates the self dealing and conflict of interest regulations of the Comptroller of the Currency, without denying to petitioner a right under federal law.

APPENDIX

APPENDIX – Continued

APPENDIX – Continued